IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA LESLIE ALEXANDER, et al., Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	Civil Action Nos. 96-2123/97-1288 (RCL)
MICHAEL JOHN GRIMLEY, et al., Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	**CONSOLIDATED CASES**

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE ATTORNEY GENERAL'S CERTIFICATION AS TO SCOPE OF EMPLOYMENT AND OF THE UNITED STATES' MOTION TO DISMISS UNDER THE WESTFALL ACT

INTRODUCTION

The immediate issue for decision in this case is who should answer as the party (or parties) defendant to plaintiffs' tort claims -- the United States, or Bernard Nussbaum, Craig Livingstone, and Anthony Marceca. That question turns on whether the claims against these individuals

arise from conduct falling within the scope of their employment, as the Attorney General has certified, or whether, as plaintiffs maintain, they were acting outside the scope of their employment when plaintiffs' FBI background reports were obtained by the White House. To resolve the issue, the Court must choose between two radically different views of the FBI files matter: the illusive and uncorroborated theories of impossibly widespread conspiracy, corruption, lies and intimidation advanced by plaintiffs, or the conclusions of the government, based on the wealth of evidence that what plaintiffs call "Filegate" was in reality nothing more than a bureaucratic snafu. The choice is not a difficult one.

In the pages that follow, the government sets forth, in painstaking detail, the evidence of what actually took place in 1993, in the White House Office of Personnel Security ("OPS"), that led to the acquisition of plaintiffs' FBI background reports. That evidence includes the testimony of persons who worked in OPS at the time, witnesses with first-hand knowledge of the events in question, who are unanimous in their view that neither Mr. Marceca, Mr. Livingstone, nor Mr. Nussbaum was ever engaged in a deliberate scheme to obtain the FBI background reports of persons who did not work at the White House. Complementing the testimony of these percipient

witnesses are contemporaneous records that detail the course of Mr. Marceca's labors on the so-called "Update Project, a routine task that went awry because of bureaucratic error, not political foul play.

As the record of competent evidence shows, the Presidential Records Act requires that certain White House files, including the personnel security files that OPS was responsible for maintaining, be transferred to the National Archives and Records Administration at the end of each President's term. Following each change of administration, OPS had to re-establish those files on "holdover" employees who continued to work at the White House. To complete this task -- known as the Update Project -- OPS requested new copies of FBI background reports on persons who remained "active" pass holders to the White House.

In 1993, however, Mr. Marceca, who took over the Update Project in midstream, requested FBI background reports on hundreds of persons who had already left the White House. The record reveals that he did so for one and only one reason: because he relied on a June 10, 1993 Secret Service list of White House pass holders that he obtained from Nancy Gemmell -- a holdover employee of the Bush Administration -- a list that neither he, nor Ms. Gemmell, nor anyone else in OPS knew

was a list of active and inactive pass holders. Once his error was discovered, the background reports that Mr. Marceca had obtained on persons no longer working at the White House were sent to archival storage, where they were never used, abused, or misused in any way.

From time to time, plaintiffs have alluded to their search for the "Rosetta Stone" of "Filegate." In the June 10, 1993 pass holder list that Ms. Gemmell obtained from the Secret Service, plaintiffs have found what they were looking for, but they do not want to accept the truth that it unlocks. As explained in great detail below, the June 10, 1993 list was the source from which Mr. Marceca (and Ms. Gemmell before him) determined whose FBI background reports to request. As the evidence shows, Mr. Marceca did not request background reports on persons who were "adversaries" of the White House -- he simply followed the June 10, 1993 list he was given in rote order.

There was thus no political motivation behind his actions, and there is absolutely no evidence that any of the background reports he inadvertently obtained on former White House employees were ever used for an improper purpose (or, for that matter, for any purpose at all). After two years of tireless discovery by the plaintiffs, the factual record

demonstrates that "Filegate" was nothing more than a bureaucratic mistake with no political dimension. That is the conclusion compelled by the evidence, and the essential conclusion already reached by Independent Counsel Kenneth W. Starr.[1/]

In contrast to the government, plaintiffs have no first-hand testimony or contemporaneous documentary evidence of what actually took place in OPS that supports their construct of events. Instead, they point to the interim report of the House Government Reform and Oversight Committee, but that committee left open the essential question now before this Court, and did not have the benefit of examining the June 10, 1993 list when it investigated this matter. Plaintiffs attempt to find evidence of wrongdoing in snippets of testimony by Mari Anderson, while ignoring the fact that this former OPS employee has consistently testified here and in other fora that the defendants in this matter are guilty of no wrongdoing. The centerpiece of their case of file "misuse" is the testimony of Linda Tripp, which by Ms. Tripp's own account

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[1/] See Statement of Independent Counsel Kenneth W. Starr Before the House Comm. on the Judiciary, dated November 19, 1998, at 47 (Def. Exh. 1). (Citations herein to "Def. Exh. ___" refer to the Exhibits in Support of the Attorney General's Certification as to Scope of Employment and of the United States' Motion To Dismiss Under the Westfall Act, filed herewith.)

is an inadmissible compound of hearsay topped with speculation, for which the plaintiffs, after deposing multiple witnesses, could find not one morsel of competent evidentiary support.

Notwithstanding the lack of evidence that Messrs. Nussbaum, Livingstone and Marceca actually did anything wrong, plaintiffs ask the Court no less than 20 times in their brief to draw "strong evidentiary inferences" against them based on innuendo, insinuation, and a number of alleged acts of file "misuse" which, if they occurred at all, took place years after the events in question here, and which not even plaintiffs contend involved Mr. Nussbaum, Mr. Livingstone or Mr. Marceca. Instead, they try to link the defendants to these and other events through First Lady Hillary Rodham Clinton, in plaintiffs' eyes the "mastermind" of "Filegate" and other perceived evils of the Clinton Administration. But there are no facts to support this claim. Indeed, Mrs. Clinton's sworn denial of any involvement with the matters alleged in the complaint remains undisputed. And so it is, then, that plaintiffs' case quickly devolves into a series of character attacks on the defendants, their colleagues, their counsel, and various third parties having nothing to do with this case. Those baseless and irrelevant accusations serve

only to highlight the plaintiffs' lack of evidence on the merits.

Under the Westfall Act, plaintiffs now have the burden of proof. To succeed in their challenge to the Attorney General's scope-of-employment determination, they must come forward with competent evidence to support a conclusion that the defendants acted beyond the scope of their employment. A review of plaintiffs' submissions and the extensive factual record shows that they have no such evidence. Rather, the evidence is undisputed that Anthony Marceca acquired the FBI background reports of persons not working at the White House as part of a well-intentioned effort to carry out a routine task, the Update Project, at the proper direction of Craig Livingstone, with no involvement on the part of Bernard Nussbaum. Thus, the tort claims against each of the three arise out of conduct that occurred within the scope of their employment. Plaintiffs' challenge to the Attorney General's scope-of-employment determination should therefore be rejected, and the United States' motion to dismiss for failure to exhaust administrative remedies should be granted.

STATEMENT

FACTS OF THIS CASE

The Office of Personnel Security

The events underlying this litigation took place in the White House Office of Personnel Security (OPS). At the outset of the Clinton Administration in 1993, OPS operated under the supervision of the White House Counsel's Office.[2/] OPS occupied a small, one-room office on the ground floor of the Old Executive Office Building, where on a daily basis the staff could observe their colleagues' activities and overhear their conversations. Anderson Dep. at 33:8-35:4, 36:4-38:8; Wetzl Decl., ¶¶ 5, 8, 21; Livingstone Decl. ¶ 9.

OPS's primary mission was to ensure that most White House employees, interns, volunteers and other persons working at the White House complex underwent the background checks (including FBI background investigations, IRS tax checks, and the like) necessary for the White House Counsel's Office to determine their suitability of character for regular White House access. Gemmell Decl., ¶ 9; Wetzl Decl., ¶ 6; Livingstone Decl., ¶ 9. In this regard OPS was also responsible, as had been the case in past administrations, for maintaining personnel security files on persons having regular

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[2/] Declaration of Nancy A. Gemmell, dated March 26, 1998 ("Gemmell Decl."), ¶ 3 (Def. Exh. 2); Declaration of Lisa S. Wetzl dated October 2, 1998 ("Wetzl Decl."), ¶ 6 (Def. Exh. 3); Deposition of Mari Lynn Anderson, dated May 7, 1998 ("Anderson Dep."), at 253:20-254:1 (Def. Exh. 4); Declaration of D. Craig Livingstone, dated July 26, 1999 ("Livingstone Decl."), ¶ 9 (Def. Exh. 5).

access to the White House complex. These files included, among other documentation on which suitability determinations were made, the summary reports of individuals' FBI background investigations. Gemmell, ¶ 6; Wetzl Decl., ¶ 6; Livingstone Decl., ¶ 11.[3/]

Prior to his position as Director of OPS, Craig Livingstone was employed as Director of Security for the Presidential Inaugural Committee, and before that as a Senior Consultant to the Clinton-Gore 1992 Presidential Campaign. Livingstone Decl., ¶ 3. In the hopes of obtaining a position with the new administration, Mr. Livingstone submitted a Campaign Personnel Information form, the standard form of application provided to all Inaugural Committee and Transition Office personnel seeking employment with the Clinton Administration. At Mr. Livingstone's request Eli Segal, Chief of Staff of President Clinton's 1992 campaign, agreed to

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[3/] Plaintiffs refer indiscriminately to the White House's acquisition in this case of "FBI files." OPS did not acquire or maintain the entire contents of individuals' FBI files. OPS acquired and maintained individuals' background investigation summary reports, which were typically 2-3 pages in length and read somewhat like resumés. Personnel security files did not contain, and OPS never requested or received, so-called "raw data." Livingstone Decl., ¶ 12; Deposition of William H. Kennedy, III, dated October 15, 1998, ("Kennedy Dep.") at 100:21-102:12, 107:16-18 (Def. Exh. 6); Declaration of Peggy J. Larson, dated January 17, 1997, ¶ 11 (Exh. 4 to Government Defendants' Motion to Dismiss and for Summary Judgment (Jan. 17, 1997)).

sponsor his application. Id., ¶ 3 & Exh. A; see Presidential Transition Resumé Routing Form dated December 10, 1992 (Def. Exh. 7) (filed under seal). Mr. Livingstone also wrote to David Watkins, who was then Director of Operations for the Transition Office, and who would later become Director of the White House Office of Management and Administration, seeking a position in the White House. See Def. Exh. 8 (filed under seal).

Not long thereafter, Mr. Livingstone was contacted by then-Associate White House Counsel Cheryl Mills to discuss a position in OPS. After meeting with Ms. Mills, he was instructed to report for work to OPS, albeit on a probationary basis. Livingstone Decl., ¶¶ 5-6. William H. Kennedy, III, the Associate White House Counsel assigned responsibility for oversight of OPS,[4/] decided in March 1993 to retain Mr. Livingstone permanently as Director of the office. Id., ¶ 7.

Mr. Livingstone first began working in OPS during the second week of February 1993. Livingstone Decl., ¶ 6. Mari Anderson, who was to become his Executive Assistant, joined him shortly thereafter. Anderson Dep. at 21:5-9, 29:2-5. Within a month of their arrival, three of the four remaining

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[4/] Livingstone Decl., ¶ 7; Kennedy Dep. at 67:3-69:12; Declaration of Bernard W. Nussbaum, dated June 28, 1999 ("Nussbaum Decl."), ¶ 3 (Def. Exh. 9).

OPS employees from the Bush Administration departed, including Jane Dannenhauer, Mr. Livingstone's predecessor as director of the office. The sole holdover employee who continued to work in OPS was Nancy Gemmell. Gemmell Decl., ¶ 4; Livingstone Decl., ¶ 15.

Ms. Gemmell had been working in OPS (formerly known as the White House Security Office) since 1981. Gemmell Decl., ¶ 3. Because she was soon the only remaining employee generally knowledgeable about the office's functions and procedures, the incoming staff relied heavily on Ms. Gemmell for information and guidance about what was required to run the office. Id., ¶ 4; Wetzl Decl., ¶ 12; Anderson Dep. at 65:18-71:15, 80:1-6; Livingstone Decl., ¶ 16. Due to these circumstances, Mr. Livingstone asked Ms. Gemmell to postpone her upcoming retirement, to facilitate a smooth transition, and to help ensure that the new staff was properly trained before she left. Ms. Gemmell agreed to delay her retirement from some time in the spring until August 1993. Gemmell Decl., ¶ 5; Wetzl Decl., ¶ 13; Anderson Dep. 71:27-72:17; Livingstone Decl., ¶ 16.

At the time, however, because of high turnover on the White House staff owing to the change of administration, OPS was heavily burdened with processing the Standard Forms 86

("SF-86s") required to initiate FBI background investigations of new White House employees. Wetzl Decl., ¶¶ 13-14; Livingstone Decl., ¶ 17; Kennedy Dep. at 274:20-275:10; see also Testimony of Jane Dannenhauer before the Committee on Government Reform and Oversight, dated June 19, 1996 ("Dannenhauer Testimony") at 1 015787 (Def. Exh. 10). The problem was compounded by the fact that the full-time OPS staff had been reduced to three (from as many as five or six during the Bush Administration), owing to the 25-percent cut in the White House staff implemented by President Clinton. Gemmell Decl., ¶ 5; Livingstone Decl., ¶¶ 18-19; see Anderson Dep. at 29:10-30:13; Kennedy Dep. at 275:14-23; Deposition of Bernard Nussbaum dated June 4, 1999 ("Nussbaum Dep.") at 391:19-392:6 (Def. Exh. 11). Even with the delay in her retirement date, Ms. Gemmell found it extremely difficult under these circumstances to train the staff fully in all facets of OPS's responsibilities, while at the same time attending to those many duties during the transition period. Gemmell Decl., ¶ 5; Wetzl Decl., ¶ 13; Livingstone Decl., ¶ 16.

The Update Project

Sometime in the spring of 1993, Ms. Gemmell, in her effort to ensure that OPS was functioning properly before she

retired, informed Mr. Livingstone of the need to conduct a task known within OPS as the "Update Project." The Update Project involved re-creating the personnel security files of holdover employees and others working at the Bush White House who continued to require access to the complex, notwithstanding the change of administration. Gemmell Decl., ¶ 6; Anderson Dep. at 74:3-78:18; Livingstone Decl., ¶¶ 20-21.

Ms. Gemmell had worked on similar projects during the Carter-Reagan and Reagan-Bush transitions. Gemmell Decl., ¶ 7. She explained to Mr. Livingstone that the Update Project was a standard procedure carried out at each change of administration, because the Presidential Records Act requires that all records created or received by the President or his staff in the conduct of their official duties must be transferred to the National Archives and Records Administration upon conclusion of the President's term in office. See 44 U.S.C. §§ 2201(2), 2203(f)(1). Among the many records routinely transferred from the White House pursuant to this statutory mandate were all personnel security files maintained by OPS, including the files of persons who continued to require access to the White House complex in the new administration. It was necessary, therefore, to re-create

and maintain personnel security files on these holdover employees. Gemmell Decl., ¶ 8; Wetzl Decl., ¶ 15; Anderson Dep. at 74:10-75:15; Livingstone Decl., ¶¶ 20-21; see Dannenhauer Testimony at 1 015787-88.[5/]

The process of re-creating personnel security files first required identification of the holdover employees and others still having regular White House access whose FBI background reports would have to be reacquired. To accomplish this threshold task, a list of "active" (i.e., current) White House pass holders would be obtained from the United States Secret Service (the "Secret Service"). Gemmell Decl., ¶ 13; Anderson Dep. at 74:15-20, 76:17-77:2; Livingstone Decl., ¶ 24. Then, as now, the Secret Service maintained a database of White House pass holders, and a computer system, the "Workers and Visitors Entry System" ("WAVES"), capable of generating pass holder lists in a variety of formats. Declaration of John L. Moffat, dated June 11, 1999 ("Moffat Decl."), ¶¶ 9-10 (Def. Exh. 12).

[5/] This was the case for two essential reasons. First, OPS required copies of holdovers' most recent FBI background summary reports in order to know when they were due for their standard five-year re-investigations by the FBI. Second, holdovers' FBI background reports were reviewed to ensure that they met the suitability criteria of the new administration. Gemmell Decl., ¶ 11; Livingstone Decl., ¶ 20. See also Dannenhauer Testimony at 1 015787-788.

Once persons still requiring White House access were identified, the next step was to obtain new copies from the FBI of their background summary reports previously provided to the White House. OPS accomplished this task after each change of administration using forms, pre-printed with the name of the incumbent Counsel to the President, that requested copies of "previous reports" on the individuals whose names were filled in on the forms. See Def. Exh. 13 (sample previous report request forms). The standard practice in each administration, including the Clinton Administration, was then to deliver the completed forms to the FBI, without prior review by the White House Counsel. Gemmell Decl., ¶ 10; Wetzl Decl., ¶¶ 16-17; Anderson Dep. at 62:21-64:22, 65:2-11, 172:9-173:9, 252:6-262:11; Livingstone Decl., ¶¶ 22-23; Kennedy Dep. at 220:9-223:2, Nussbaum Decl., ¶ 8. (Thus, although the requests were submitted in the name of the Counsel to the President, the White House Counsel in fact had no first-hand knowledge of any particular request.) If the FBI had summary reports on file about the individuals in question, then it would hand-deliver copies of the reports to OPS. Gemmell Decl., ¶ 10; Wetzl Decl., ¶ 17.

After Ms. Gemmell informed Mr. Livingstone of the need to conduct the Update Project, he requested that she begin work

on the project before she retired. She did so, sometime in June 1993. Gemmell Decl., ¶ 12; Wetzl Decl., ¶ 16.

The June 10, 1993 Secret Service Pass Holder List

Ms. Gemmell prepared for the Update Project by requesting a customized list from the Secret Service of active White House pass holders, to identify persons still working at the White House whose personnel security files would have to be re-created. The list she obtained was computer-generated on green- and white-striped oversize paper, and broken down by twelve government agencies and private-sector organizations with employees assigned to the White House complex, such as White House Operations (i.e., the White House Office), the General Services Administration ("GSA"), the National Park Service ("NPS"), and American Telephone & Telegraph ("AT&T").[6/] Pass holders were listed under each employer in alphabetical order. Gemmell Decl., ¶¶ 13, 20. See Anderson Dep. at 88:3-89:14.

[6/] The other employers on the list were the Executive Residence, FBI, Central Intelligence Agency ("CIA"), National Security Council ("NSC"), Reporting Agency, Chesapeake & Potomac Telephone Company ("C&P"), Other Government Agencies, and Miscellaneous Non-Government Agencies. Gemmell Decl., ¶ 13. OPS was responsible for maintaining personnel security files on the staff of these 12 employers assigned to the White House. See, e.g., Declaration of Charles C. Easley, dated August 19, 1999 ("Easley Decl."), ¶ 4 (Def. Exh. 14).

The list also contained further identifying information -- date and place of birth, and social security number -- that the FBI required when OPS ordered a previous report on an individual, but which was not provided on pass holder lists that the Secret Service routinely made available to OPS. Gemmell Decl., ¶ 14; Anderson Dep. at 89:21-90:8, 90:17-91:7; see Wetzl Decl., ¶ 30. The list Ms. Gemmell obtained also included the pass type held by each person, needed to identify temporary pass holders for whom no previous reports would be needed. Gemmell Decl., ¶ 15.

Attached as Exhibit A to Ms. Gemmell's declaration is a true copy of the list she obtained for purposes of conducting the Update Project, except that pages 1-38 of the section for "White House Operations" (i.e., the White House Office), the pages that list persons with last names beginning A to Po, are missing. Gemmell Decl., ¶ 16 & Exh. A, at 28; Wetzl Decl., ¶¶ 30-31; Anderson Dep. at 95:6-98:8, 103:5-104:1. This list is identifiable as the one Ms. Gemmell requested from the Secret Service, for at least four reasons.

First, it is organized by the same twelve employers, and contains the same customized information (date and place of birth, social security number, and pass type) as the list Ms. Gemmell requested. Gemmell Decl., ¶ 17 & Exh. A; see Wetzl

Decl., ¶ 30; Anderson Dep. at 96:16-97:4. Second, the list is dated June 10, 1993, about the time Ms. Gemmell was preparing to begin the Update Project. Gemmell Decl., ¶ 18; Wetzl Decl., ¶ 30; Anderson Dep. at 97:16-98:4. Third, there appears a handwritten note, "Lables [sic] completed 7/2/93" on page one of the section for NSC employees. Gemmell Decl., Exh. A at CGE 056186. This is likely a reference to the fact that Ms. Gemmell had file folders prepared for the individuals named on the list -- with type-written labels -- in anticipation of requesting their previous reports from the FBI. Id., ¶ 19; Wetzl Decl., ¶ 31; Anderson Dep. at 91:22-92:15, 98:13-100:22.

Finally, the June 10, 1993 list attached to Ms. Gemmell's declaration has been examined by a Secret Service computer specialist, who is thoroughly familiar and experienced with the WAVES computer system. Moffat Decl., ¶¶ 7-8, 11 & Exh. A. The analysis indicates that Exhibit A to Ms. Gemmell's declaration is a Secret Service list of White House pass holders, generated by the WAVES computer on June 10, 1993. Id., ¶¶ 12-18. More importantly, the Secret Service analysis also reveals that this list was a composite of both active and inactive pass holders in the WAVES database at the time. As such, it could include persons who had not been active White

House pass holders for up to eight years. Moffat Decl., ¶¶ 14-18.[7/]

The Secret Service's review of Exhibit A also confirms what is apparent even to the layperson's eye: that the list includes no designation -- such as "A" or "I" -- to identify which persons on the list were active pass holders at the time, and which were inactive pass holders. Moffat Decl., ¶ 14; see Gemmell Decl., ¶ 20 & Exh. A; Anderson Dep. at 101:1-12. Because the June 10, 1993 list did not specify that it included both active and inactive pass holders, it was believed in OPS to be an active pass holder list only, as Ms. Gemmell had requested. Gemmell Decl., ¶¶ 13, 20; Anderson Dep. at 89:21-90:15, 101:13-102:9.

Ms. Gemmell's Progress on the Update Project

After she obtained the June 10, 1993 pass holder list from the Secret Service, and prepared file folders for the

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[7/] The Secret Service has also identified the program that was likely used to generate the June 10, 1993 list from the WAVES database, as well as the code that could be used to generate an identical list containing only active pass holders. The two programs are identical except that the program for the generation of a list comprised solely of active pass holders requires an additional line of code that specifically excludes inactive pass holders from the list. The absence of this line of code would result in the generation of a list of both active and inactive pass holders, without indication of their pass holder status, as in the case of the June 10, 1993 Secret Service list. Moffat Decl., ¶¶ 19-22 & Exhs. C, D.

background reports to be received from the FBI, Ms. Gemmell began requesting the previous reports of persons named on the list. Gemmell Decl., ¶ 21; Wetzl Decl., ¶ 18; Anderson Dep. at 91:22-93:3. Mr. Livingstone did not personally supervise Ms. Gemmell's work on the Update Project, as his attention remained focused on other matters with higher priority in the office. Livingstone Decl., ¶ 22. Nor did he (or anyone in the White House Counsel's Office) review the request forms Ms. Gemmell sent to the FBI, because these requests were made in the ordinary course of OPS's business, using long-established procedures. Id., ¶ 23.

Ms. Gemmell's approach was to begin with federal and private-sector employers such as AT&T, the National Park Service, and GSA, that she knew were likely to have little turnover due to the change of administration. Gemmell Decl., ¶ 21. Her purpose in doing so related to her knowledge that, during transition periods, when large numbers of White House staff in political positions depart, and are replaced with new people hired by the incoming administration, it is difficult for the Secret Service (which relies on the White House to inform it when personel depart) to maintain an accurate list of active pass holders. She also knew that later in the year, once political turnover in the White House was largely

completed, the Secret Service would address this problem. As it had in the past, the Secret Service would issue new permanent passes to persons working at the White House, of a different color than the existing passes, and remove from the roster of active pass holders all those who did not obtain new passes. This process, known as the "color change," ensured that the active pass holder list was far more accurate after the color change than before. Id., ¶¶ 22-23.

In 1993, however, it was not practical to wait until after the color change to begin the Update Project, as at prior changes of administrations, because, following Ms. Gemmell's retirement in August 1993, there would be no one left in OPS with the requisite knowledge and understanding to carry out the project. Gemmell Decl., ¶ 24. That being the case, Ms. Gemmell began the Update Project prior to her retirement, but started out with the non-political employers having the least turnover, and, consequently, the least likelihood of inaccuracy in the Secret Service's active pass holder list. She anticipated that, following her retirement, OPS would obtain a new list from the Secret Service, after the color change, before requesting FBI previous reports on employees of political offices within the White House. Id., ¶ 25.

It is possible to reconstruct the work that Ms. Gemmell (and others) performed on the Update Project in some detail, with the aid of FBI records, see Third Declaration of Sherry L. Carner, dated September 27, 1999 ("Carner Decl."), ¶¶ 2-12 (Def. Exh. 15), and OPS records, see Second Declaration of Edward F. Hughes dated July 30, 1999 ("Hughes Decl."), ¶¶ 3-4 (Def. Exh. 16); Easley Decl., ¶ 9, that identify persons whose previous reports the White House requested between January 1993 and June 1996. See Declaration of Maria Swails-Brown dated September 28, 1999 ("Swails-Brown Decl."), ¶¶ 3-26 (Def. Exh. 17).[8/]

[8/] The government looked to these records to compile the most comprehensive practicable list of whose previous reports the White House requested (and when) between January 1993 and June 1996 (the time when the FBI and the White House revised the procedures by which previous report requests are made, to avoid erroneous requests in the future, see Memorandum to the FBI Director from H. M. Shapiro, General Counsel, dated June 14, 1996, at FBI 004221-22, 004224 (Def. Exh. 18)). This compilation began with "master purge log" printouts from an FBI database of White House previous report requests, and copies of White House previous report request forms that the FBI also keeps on file. See Carner Decl., ¶¶ 3-10; Swails-Brown Decl., ¶¶ 3-5, 8. The government also relied on an OPS ledger of the previous reports that office received from the FBI. See Hughes Decl., ¶¶ 3-4; Swails-Brown Decl., ¶¶ 16-17, 21.

The FBI and EOP produced their respective records to the plaintiffs over a year ago. But it was only recently, after government counsel compared the OPS ledger to the FBI records noted above, and provided the ledger to the FBI to confirm counsel's findings, that the government defendants first

(continued...)

Beginning on July 30, 1993, and continuing until her retirement that August,[9] Ms. Gemmell requested previous reports on 231 individuals. Swails-Brown Decl., ¶ 27(b) & Exh. K at 2-12. Two-hundred thirty (230) of these persons are listed on the June 10, 1993 pass holder list, id., ¶ 27(b), further indicating that Ms. Gemmell relied on that list to prepare her requests for previous reports. She proceeded in a

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[8](...continued)
discovered that these FBI records for the most part did not reflect previous report requests that the Bureau responded to between September 16 and October 13, 1993. (For all other time periods, these FBI records and the OPS ledger all but match.) Carner Decl., ¶ 12; Swails-Brown Decl., ¶ 18. The government has been unable to ascertain the cause of this omission. Carner Decl., ¶ 12. However, this does not raise any doubts about the accuracy of the OPS ledger of previous reports received. The FBI examined the files of a random sample of the individuals named on the OPS ledger of previous reports received, and, in each case, found dissemination stamps indicating that, in fact, their previous FBI background investigation reports had been disseminated to the White House. Declaration of Paul C. Cignoli dated September 28, 1999 ("Cignoli Decl."), ¶ 13 (Def. Exh. 19). The master purge log printouts and request forms, together with the OPS ledger, remain the most comprehensive records available of Clinton White House requests for FBI previous reports, short of a file-by-file inspection of hundreds of thousands of FBI background and White House personnel security files. See Carner Decl., ¶¶ 11-13.

[9] It appears that Ms. Gemmell's final requests for previous reports were received at the FBI on August 17, 1993, the day before Anthony Marceca began his detail at OPS. See Swails-Brown Decl., Exh. K at 12; Def. Exh. 20 (request to renew Mr. Marceca's detail showing that his initial detail began August 18, 1993 and ended February 18, 1994) (filed under seal).

highly systematic fashion through eight of the twelve employers included on the list, the National Park Service, AT&T, C&P, the CIA, the Reporting Agency, Miscellaneous Non-Government Employees, the FBI, and Other Government Agencies, consistent with her intention to focus at the outset on non-political offices within the White House complex. Id., Exh. K at 2-9; see Gemmell Decl., ¶¶ 21, 25. She also began (but did not finish) making requests on employees of GSA. Swails-Brown Decl., Exh. K at 9-12.

In the case of each employer, Ms. Gemmell proceeded alphabetically through persons named on the June 10, 1993 list. Swails-Brown Decl., Exh. K at 2-12. For example, on August 9, 1993, she submitted requests (14 in all) for previous reports on FBI personnel listed as White House pass holders, starting with then-Special Agent Gary Aldrich and ending with James York. Id., Exh. K at 8-9. Similarly, Ms. Gemmell made requests for previous reports on approximately 60 persons listed as GSA employees, beginning with Delores Anderson and ending, at the time of her retirement, with Clifton Foreman. Id., Exh. K at 9-12.

By the time she retired, Ms. Gemmell had begun but not completed the Update Project. See generally Gemmell Decl., ¶¶ 25-30; Wetzl Decl., ¶¶ 18-20; Livingstone Decl., ¶¶ 21, 28.

When she departed OPS, she left the June 10, 1993 pass holder list she had been using in plain view at her work station in the OPS vault, with the expectation that the OPS staff would use the list to continue the Update Project in her absence. Gemmell Decl., ¶ 30; Anderson Dep. at 93:8-94:3; see Wetzl Decl., ¶¶ 20, 26. Ms. Gemmell retired approximately one week before Anthony Marceca began working at OPS. Gemmell Decl., ¶ 29; Wetzl Decl., ¶ 19; Anderson Dep. at 72:18-73:22.

Anthony Marceca's Detail to OPS

Anthony Marceca, a criminal investigator for the Department of the Army, had worked with Craig Livingstone in past Presidential campaigns. He contacted Mr. Livingstone shortly after he (Mr. Livingstone) began working at OPS to inquire about obtaining a position in the White House. Livingstone Decl., ¶ 26. By this time, it was already apparent to Mr. Livingstone that, between personnel cuts and the flood of paperwork the OPS staff was responsible for processing, id., ¶¶ 17-19; see supra at 7-8, 10-11, the office required more full-time staff. Id., ¶ 22. Mr. Kennedy agreed with this assessment, as did others familiar with the situation. Kennedy Dep. at 274:20-276:2; see Anderson Dep. at 53:1-13; Nussbaum Decl., ¶ 5. Messrs. Livingstone and Kennedy had made a number of requests to the White House Office of Management and Administration for additional full-time staff in OPS, but these were refused for budgetary reasons. Livingstone Decl., ¶ 19; Kennedy Dep. at 276:3-12.

It occurred to Mr. Livingstone, however, that Mr. Marceca could be detailed to OPS on a "non-reimbursable" basis, meaning his salary would continue to be paid by the Defense Department, not the White House, thus avoiding any budgetary problems. Moreover, given Mr. Marceca's background in

military affairs and security-related matters, Mr. Livingstone believed he would be an asset not only in processing SF-86s, but also the large volume of paperwork on military personnel for which OPS was responsible. Livingstone Decl., ¶ 26; Kennedy Dep. at 276:16-277:9.

For all these reasons, Mr. Livingstone recommended to Mr. Kennedy that Mr. Marceca be detailed to OPS on a non-reimbursable basis for six months.[10/] Mr. Kennedy agreed, and made the necessary arrangements with the Defense Department. Livingstone Decl. ¶ 27; Kennedy Dep. at 276:13-277:23; see Anderson Dep. at 51:1-19.[11/] Mr. Marceca's detail began on August 18, 1993. See Def. Exh. 20; Wetzl Decl., ¶ 21; Anderson Dep. at 55:9-14.

Mr. Marceca's Progress on the Update Project

Shortly before Ms. Gemmell retired, she learned that Mr. Marceca would be detailed to OPS, and met with him in the OPS vault for several hours to provide him an overview of OPS's duties and responsibilities. Gemmell Decl., ¶ 27; Anderson

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[10/] Mr. Marceca also came highly recommended by his superiors at the Department of Defense. See Letter from David C. Allan to William Kennedy dated April 6, 1993 (Def. Exh. 21) (filed under seal).

[11/] The idea of detailing Mr. Marceca to OPS was Mr. Livingstone's, endorsed by Mr. Kennedy, with no involvement by either the First lady or Mr. Nussbaum. Livingstone Decl., ¶ 27; Kennedy Dep. at 277:24-278:16; Nussbaum Decl., ¶¶ 5, 7.

Dep. at 84:9-86:5. They had a general discussion of the many functions and procedures of the office, Gemmell Decl., ¶ 27, during which Ms. Gemmell mentioned the Update Project, and likely pointed out to Mr. Marceca the Secret Service list that she was using to conduct the project. Id., ¶ 28.

Ms. Gemmell did not, however, explain the procedures for completing the project in any detail. In particular, she did not inform Mr. Marceca of the need to obtain a new Secret Service list after the color change of White House passes before requesting previous reports on persons employed by political offices in the White House complex. She was unaware that Mr. Marceca would be assigned primary responsibility for completing the Update Project after her retirement. Gemmell Decl., ¶ 28.

In fact, Mr. Marceca was not detailed to OPS for the specific purpose of working on the Update Project. The top priority in OPS at the time was processing the swell of SF-86s and other paperwork necessary for the initiation of background checks and subsequent issuance of permanent White House passes to new employees of the Clinton Administration. Livingstone Decl., ¶ 25; see Wetzl Decl., ¶¶ 21, 24-25; Anderson Dep. at

117:5-13.[12/] It was Mr. Livingstone's intent, in arranging for Mr. Marceca's detail, that he assist the rest of the staff with pending SF-86s, Livingstone Decl. ¶ 26; see Wetzl Decl., ¶ 21; Anderson Dep. at 51:9-52:16, and, when his detail began, that is exactly what Mr. Marceca did. He did not turn his attention to the Update Project until the backlog of SF-86s had been reduced, some time after his arrival in OPS. Wetzl Decl., ¶ 21; Livingstone Decl., ¶ 28.

When he did so, he relied on the same White House pass holder list that Ms. Gemmell had obtained from the Secret Service, and then left behind in the OPS vault. Anderson Dep. at 94:5-95:5; see Wetzl Decl., ¶¶ 22, 34-35. As with Ms. Gemmell, neither Mr. Livingstone, nor Ms. Anderson (who by then had become Mr. Livingstone's Executive Assistant), closely supervised or monitored Mr. Marceca's work on the project. Livingstone Decl., ¶ 29; see Anderson Dep. at 21:10-22:1, 87:21-88:2, 117:5-118:7. As with Ms. Gemmell, it is nevertheless possible to reconstruct the work he performed on the Update Project, using records of OPS requests for previous reports. See supra at 20-22 & n. 8.

[12/] Completing the Update Project was a less urgent matter because holdovers had already been investigated by the FBI, had been deemed suitable for access by the prior administration, and already had permanent passes. Livingstone Decl., ¶ 25; see also Dannenhauer Testimony at 1 015787.

Developing a complete picture of the work performed by Mr. Marceca has, however, required an extra step, because it was he who first requested previous reports on pass holders employed in the White House Office, see infra at 29, and because the "A" to "Po" portion of the June 10, 1993 list for White House Office employees is missing. See supra at 15-16; Gemmell Decl., ¶ 16 & Exh. A. At the request of the Department of Justice, the Secret Service, using the program it identified as that likely used to generate the June 10, 1993 pass holder list, see n. 7, supra; Moffat Decl., ¶¶ 19-21, and a December 1994 back-up tape of the WAVES database, has re-created the missing portion of the list. Id., ¶¶ 20(b), 23. The Secret Service's analysis shows that the regenerated list is essentially identical to the missing portion of the June 10, 1993 list. Id., ¶¶ 20(c), 24-25.[13/] This regenerated list, together with the extant portion of the June 10, 1993 list, and the records of OPS requests for

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[13/] The regenerated list should be identical to the missing portion of the June 10, 1993 list, with the immaterial exceptions of (i) any changes made to the pass holders' personal data made between June 10, 1993 and December 3, 1994, such as changes in employer, or married name; (ii) the possible deletion of pass holders who had become inactive for more than eight years, or who had died, during that time; and (iii) "dummy" pass holder records, created to test system functions (and having obviously fictitious names such as "TEST4," "KNIFE, MAC THE," and "TAFT, WILLIAM HOWARD)." Moffat Decl., ¶¶ 20(c), 25.

previous reports, see supra at 20, reveals important details of Mr. Marceca's work on the Update Project.

During the course of Mr. Marceca's six-month detail, OPS requested previous reports on 1,137 individuals, the vast majority of whom (1,121) are named on either the June 10, 1993 pass holder list, or the re-created portion of the list, Swails-Brown Decl., ¶ 27(c), further indicating that Mr. Marceca used the June 10, 1993 pass holder list obtained by Ms. Gemmell for purposes of his work on the Update Project. Similarly, of these 1,137 individuals, 1,116 worked either for the NSC, the Executive Residence, GSA, or the White House Office, id., ¶ 28, the four employers among the 12 included on the June 10, 1993 list that Ms. Gemmell either did not begin, or (in the case of GSA) did not complete before retiring.

Although Mr. Marceca started work in OPS on August 18, 1993, he did not turn his attention in earnest to the Update Project until September 14, 1993 -- almost one month later -- when he began ordering previous reports on NSC employees. See Swails-Brown Decl., Exh. K at 12 (showing just two requests for previous reports between August 18 and September 14, 1993). Between September 14 and 23, 1993, Mr. Marceca submitted requests for previous reports on 317 persons listed on the NSC portion of the June 10, 1993 pass holder list,

proceeding alphabetically from Scott Addis to Charles Zingler. See id., ¶ 29 & Exh. K at 12-29; id., Exh. G at CGE 056186-193. On September 22, 1993, he turned next to the Executive Residence, ordering previous reports on 87 Residence employees from William Allman to Edward Winsor. See id., ¶ 30 & Exh. K at 25-29; id., Exh. G at CGE 056222-224. Among these was a request for a previous report on White House usher Chris Emery. See id., Exh. K at 26, Exh. G at CGE 056222.

After Mr. Marceca submitted these requests for previous reports on NSC and Residence employees, there was apparently no significant activity on the Update Project for more than a month, until October 29, 1993. See Swails-Brown Decl., Exh. K at 29 (showing only two requests for previous reports between September 23 and October 29, 1993). On that date, Mr. Marceca began ordering previous reports on GSA employees, picking up (at the letter "F") essentially where Ms. Gemmell had left off. Id., Exh. K at 29.[14/] Between October 29 and November 27, 1993, Mr. Marceca made previous report requests on 211 GSA employees, proceeding in alphabetical order from Andrew

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[14/] Ms. Gemmell's last request was for a previous report on a GSA employee named Clifton Foreman. Swails-Brown Decl., Exh. K at 12. On October 29, 1993, Mr. Marceca began with a GSA employee named Andrew Francis, whose name almost immediately follows Mr. Foreman's on the June 10, 1993 list of GSA employees. Id., Exh. G at CGE 056096.

Francis to Ralph Yost, id., ¶ 31 & Exh. K at 29-39, and following the GSA portion of the June 10, 1993 list almost name for name.[15/]

It was not until completing the NSC, Residence, and GSA portions of the list that Mr. Marceca started ordering previous reports for White House Office employees, on December 6, 1993, almost four months after his six-month detail had begun. Swails-Brown Decl., Exh. K at 39. Between December 6, 1993 and February 14, 1994 (four days before his detail ended, see supra at 21, n. 9), Mr. Marceca ordered previous reports on 467 White House Office employees whose names appear on the June 10, 1993 pass holder list, from Carol Aarhus to Julie Goldberg. Id., ¶ 32 & Exh. K at 39-60. Among these was Billy Dale, the former Director of the White House Travel Office, whose White House employment was terminated in May 1993. Id., Exh. K at 50. Mr. Dale was one of about 48 White House Office employees, from Kathleen Carlson through Mr. Dale, whose previous reports Mr. Marceca requested on December 28, 1993. Id., Exh. K at 48-50.

[15/] Of the 221 names from Andrew Francis to the end of the GSA portion of the list, Mr. Marceca ordered previous reports on all but ten. Swails-Brown Decl., Exh. G at CGE 056097-100.

A still closer look at the work Mr. Marceca performed on the Update Project reveals that, for the most part, he did not order previous reports on temporary pass holders, see Swails-Brown Decl., ¶¶ 33-35, that is, persons whose pass type designations on the June 10, 1993 list begin with the letter "T." Moffat Decl., ¶ 20(c)(iv) n. 3. This was consistent with prior OPS practice because, whereas the concern of the Update Project was holdover employees, temporary pass holders were generally either new employees whose background investigations were in progress, or persons working at the White House for only a short period (such as interns) for whom OPS was not required to maintain a background report. Gemmell Decl., ¶ 15; Livingstone Decl., ¶ 45.

The record also reflects that, in requesting previous reports on White House Office employees, Mr. Marceca not only skipped temporary pass holders, but also skipped 115 permanent pass holders as well. Swails-Brown Decl., ¶¶ 36-37 & Exh. P; Cignoli Decl., ¶ 11 & Exh. A. For the most part these were new employees of the Clinton Administration who had already entered on duty at the White House prior to Mr. Marceca's detail, Easley Decl., ¶¶ 2, 5-6, for whom OPS already would have established personnel security files, Livingstone Decl.,

¶¶ 11, 46,[16] and whose background investigations already would have been underway. Id., ¶ 46. It was therefore consistent with the purposes of the Update Project for Mr. Marceca to skip these new Clinton Administration employees named on the June 10, 1993 list. Id. Aside from these new employees, and temporary pass holders, Mr. Marceca, followed the White House Office portion of the June 10, 1993 pass holder list almost name for name from Carol Aarhus to Julie Goldberg. Swails-Brown Decl., ¶ 37.

As his work progressed, Mr. Marceca at some point became aware, and evidently brought to Ms. Anderson's attention, that he had received previous reports on some persons who no longer required access to the White House complex. Anderson Dep. at 269:11-270:6. This fact apparently came to his attention following his attempt to carry out a second step in the Update Project -- initiating five-year re-investigations on holdover employees. See n. 5, supra.

Once he obtained previous reports on employees of the Residence, NSC and GSA, Mr. Marceca circulated memoranda to these offices listing the employees whose previous reports

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[16] Mr. Marceca has attested that in conducting the Update Project he would request previous reports only on those individuals who did not already have existing files in the OPS vault. Declaration of Anthony Marceca dated June 9, 1996, ¶ 7 (Def. Exh. 22).

indicated they were due for five-year re-investigations. These memoranda asked that the employees listed complete new forms SF-86 (so that their re-investigations could be initiated) and that OPS be notified if any of them had left the White House. (This was the same procedure followed by Nancy Gemmell.) When these offices responded to his memoranda, Mr. Marceca thereby learned that some of the employees he had listed no longer worked at the White House. See Deposition of Mari Anderson dated October 1, 1996 ("Anderson Sen. Dep.") at 84-91, 154-56 (Pl. Exh. 28)[17]; Def. Exh. 23 (collecting Mr. Marceca's memoranda to the Residence, NSC and GSA).

At this time, it was not understood within OPS that Mr. Marceca had obtained reports on persons who had never worked at the Clinton White House. It was thought that these were holdover employees who had worked at the Clinton White House for some period of time (like Ms. Gemmell), but who had departed before Mr. Marceca obtained their previous reports.

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[17] Citations herein to "Pl. Exh. ___" refer to the exhibits to Plaintiffs' Supplemental Memorandum Concerning Substitution and Class Certification, as originally filed on August 9, 1999. Plaintiffs' supplemental memorandum is cited herein as "Pl. Mem."

Anderson Dep. at 134:7-137:17, 139:15-142:14, 270:14-271:13, 343:5-11.[18/]

Apparently, Mr. Marceca consulted with his colleagues (Ms. Anderson, at least) as to how he might determine pass holders' current employment status before requesting their previous reports. Anderson Dep. at 138:4-139:1, 272:10-14. But the White House Office portion of the June 10, 1993 list did not identify for which of the many components within the White House Office each pass holder actually worked (such as the Office of the Staff Secretary, the Office of Legislative Affairs, the Counsel's Office, the Office of Management and Administration, etc.). See Federal Yellow Book at I-8 to I-11 (Fall 1993) (Def. Exh. 24). OPS therefore had no guidance as to where it could direct inquiries of that kind. Id. at 139:3-14.

This situation was not unique to the Update Project and, as such, was not brought to the attention of the Counsel's Office, or anyone else outside OPS. Anderson Dep. at 269:11-274:2; see Kennedy Dep. at 193:3-17, 246:1-24; Nussbaum Decl., ¶ 10. From time to time, OPS would request FBI

[18/] This was a natural assumption. Given the belief then that the June 10, 1993 list was an active pass holder list only, it would have been logical to conclude that Mr. Marceca had obtained background reports on persons who remained White House employees on June 10, 1993, but who had since departed.

background information on certain individuals -- persons working only a short time at the White House such as interns, volunteers, or task force members -- but, due to processing delays, would not receive it until after they had departed. Anderson Dep. at 271:21-22, 273:10-274:2; Livingstone Decl., ¶ 34. Ms. Gemmell had instructed the other staff that nevertheless these FBI reports, once received, were considered Presidential records, and could not be returned. Instead, they would have to be forwarded to the Office of Records Management, for archiving. Anderson Dep. at 276:3-17. When the same phenomenon was believed to have occurred in connection with the Update Project, Ms. Anderson and Mr. Marceca proceeded in the same fashion: they placed Update Project files on persons no longer requiring White House access together in a designated drawer within the OPS vault, and slated them for archiving, as they understood was required. Id. at 143:10-22, 146:16-147:4, 271:18-272:1, 273:10-14, 387:13-18.

Termination of Mr. Marceca's Detail

As Mr. Marceca's six-month detail to OPS neared its conclusion, Mr. Livingstone decided that he wanted Mr. Marceca to continue working at OPS, and asked Mr. Kennedy to extend the detail for another 4-5 months. Livingstone Decl., ¶ 31;

Kennedy Dep. at 278:7-13. At first, Mr. Kennedy approved of the idea, but soon discovered that, if the detail were renewed, then the White House would have to pay Mr. Marceca's salary, which the Office of Management and Administration would not approve. In addition, about that same time Mr. Kennedy reviewed a copy of Mr. Marceca's partial background report. Considering both the budgetary difficulties and the new information available in Mr. Marceca's background report, Mr. Kennedy decided against renewing the detail. Livingstone Decl., ¶ 31; Kennedy Dep. at 279:8-13.[19/]

Mr. Marceca's OPS detail ended on February 18, 1994. Def. Exh. 20. By that time he, like Nancy Gemmell, had started work on the Update Project but had not completed it, Wetzl Decl., ¶ 23; Livingstone Decl., ¶ 28, progressing only so far as "Go" in the Secret Service's alphabetical roster of White House Office pass holders. Swails-Brown Decl., ¶¶ 28, 32 & Exh. K at 39-60; see Wetzl Decl., ¶ 28. Upon his departure, he stored personnel security files he had prepared (in many cases containing previous reports he had acquired), together with various papers he used or produced in the course

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[19/] Neither Mr. Nussbaum, nor the First Lady, had anything to do with either seeking to extend Mr. Marceca's detail, or the decision against doing so. Livingstone Decl., ¶ 32; Kennedy Dep. at 278:7-16, 279:22-280:1.

of working on the project, in a file drawer in the OPS vault. Wetzl Decl., ¶ 23.

Lisa Wetzl Completes the Update Project, and Archives Files That Mr. Marceca Had Mistakenly Accumulated.

Lisa Wetzl worked in OPS from June 1993 until September 1995, first as an intern, later as a staff person, and finally, following Ms. Anderson's departure in September 1994, as Executive Assistant to Mr. Livingstone. Wetzl Decl., ¶ 2. Like others on the staff, her duties involved processing the paperwork required to initiate background investigations on new employees at the White House. Id., ¶¶ 3, 14. Following Mr. Marceca's departure, she also took on responsibility for completing the Update Project. Id., ¶¶ 4, 24, 36; Livingstone Decl., ¶ 33.

Owing to the continued press of higher priority tasks, no further work was completed on the Update Project for several months after Mr. Marceca left the office. Wetzl Decl., ¶¶ 24-25; Livingstone Decl., ¶ 33; see Swails Brown Decl., Exh. K at 60. During this period, when Ms. Wetzl had repeated occasion to enter the OPS vault almost every day, she saw no evidence whatsoever of anyone removing or otherwise handling the files or other work papers that Mr. Marceca had stored there. Wetzl Decl., ¶ 24; see also id., ¶ 11; Anderson Dep. at 146:16-

147:16, 153:18-22, 170:15-18, 295:20-296:5; Livingstone Decl., ¶ 38.[20]

When Ms. Wetzl turned her attention to the Update Project, she started by looking over the materials Ms. Gemmell and Mr. Marceca had left behind in the vault. Wetzl Decl., ¶ 25. At Ms. Gemmell's work area, she found a Secret Service list of White House pass holders, together with hundreds of completed previous report request forms, and file folder labels with typed names corresponding to the request forms. The pass holder list contained information, such as social security numbers, not found on the routine lists provided to OPS by the Secret Service, and contained many pages of White House Office employees whose last names began with "A" and "B." Id., ¶ 26.[21] Because the list contained hundreds of

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[20] From time to time, Mr. Livingstone hand-carried personnel security files to the Counsel's Office, but these were files of individuals, currently employed at the White House, whose background reports were reviewed for suitability reasons. None of the files Mr. Livingstone took to the Counsel's Office on these occasions contained background reports acquired in connection with the Update Project, or that concerned persons no longer working at the White House. Livingstone Decl., ¶ 38; Deposition of David Craig Livingstone dated May 26 and June 8, 1999 ("Livingstone Dep."), at 99:7-18 (Def. Exh. 25); see Anderson Dep. at 151:10-152:8, 153:18-22, 163:8-13, 164:1-7, 166:12-22, 170:4-9, 287:16-288:7, 291:8-20, 294:18-295:3; Kennedy Dep. at 214:5-215:17, 246:12-24.

[21] In addition, Ms. Wetzl recalls nothing on the list to indicate whether the pass holders named on the list were

(continued...)

names she did not recognize, Ms. Wetzl concluded it was out of date, and discarded both the list and the request forms Ms. Gemmell had prepared. Id., ¶ 27.

In looking at Mr. Marceca's separate bin of files and work papers, Ms. Wetzl noted that he had accumulated files in excess of the number of White House staff, stored in alphabetical order from "A" to "Go," and that they included many names that Ms. Wetzl did not recognize. (In at least one case, she recognized the name of an individual who she believed no longer needed White House access.) She concluded that Mr. Marceca must have also been working from an out-of-date Secret Service list, similar to Ms. Gemmell's. Wetzl Decl., ¶ 28.

Shortly thereafter, Ms. Wetzl informed Mr. Livingstone of her discovery, and expressed her frustration that she would have to sort through all of the files Mr. Marceca had prepared, to segregate those OPS needed to retain. Wetzl Decl., ¶ 29. Mr. Livingstone understood her to be saying that Mr. Marceca had ordered reports on persons who had at one time worked for the Clinton Administration, but who had departed by the time Mr. Marceca obtained their previous reports from the

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[21]/(...continued)
active or inactive. Wetzl Decl., ¶ 26.

FBI, as was known occasionally to occur with other OPS requests for FBI background information. See supra at 33-34. He did not realize at the time that Mr. Marceca had obtained previous reports on individuals who had *never* worked at the Clinton White House. Livingstone Decl., ¶¶ 34-35.

For this reason, he considered Ms. Wetzl's discovery to be something of a nuisance, nothing more, and made no mention of it to Mr. Kennedy, Mr. Nussbaum, or anyone else outside OPS. Id.; see Wetzl Decl., ¶ 29; Anderson Dep. at 144:1-145:10, 269:13-270:13; Kennedy Dep. at 246:12-247:3; Nussbaum Decl., ¶ 10. Neither then nor at any later time did Mr. Livingstone suggest to Ms. Wetzl that she treat her discovery of these files as any kind of secret. Wetzl Decl., ¶ 29; Livingstone Decl., ¶ 35.

Over the months that followed, Ms. Wetzl continued to work on the Update Project, doing her best to identify the previous reports that Mr. Marceca had mistakenly acquired on persons no longer requiring access to the White House, while completing the requests for previous reports on White House Office employees. Wetzl Decl., ¶ 32. In particular, between April 26 and June 27, 1994, she submitted requests on approximately 56 White House Office personnel, starting essentially where Mr. Marceca had left off, at "Go," and

finishing at the end of the alphabet with Julie Watson. See Swails-Brown Decl., Exh. K at 60-63. She made a request for Linda Tripp's previous report on June 20, 1994, one of 19 requests she submitted on that date for persons whose last names ranged from Rouse to Williams. Id., Exh. K at 62-63.

In December 1994, due to space limitations in the office, she sent the files she believed Mr. Marceca had mistakenly assembled to the White House Office of Records Management ("ORM") for archival storage. Id., ¶ 33.[22/] To prepare the files for archival storage, Ms. Wetzl boxed them up, together with the set of work papers that Mr. Marceca had also left behind. For purposes of future identification, she placed a "post-it" note on the stack of work papers with the handwritten notation "Update Project as of 1/94 -- Marceca." Wetzl Decl., ¶ 34. She also prepared an inventory of the boxes' contents, the last page of which specifically identifies Mr. Marceca's work papers using the same designation "Update Project as of 1/94 -- Marceca." Id., ¶ 34

[22/] The summary reports contained in these files were not returned to the FBI because (as discussed supra, at 33-34), according to the advice that OPS staff had received from Ms. Gemmell, all documents obtained in the performance of OPS's official functions, with rare exception, constituted records that the Presidential Records Act required the White House to retain until the end of the Administration. Wetzl Decl., ¶ 33; Anderson Dep. at 143:10-22, 275:18-276:17; Livingstone Decl., ¶ 30; see Kennedy Dep. at 99:23-100:15.

& Exh. B. After making these preparations, Ms. Wetzl sent the boxes to ORM. Id., ¶ 34.

Ms. Wetzl's inventory of the files that she determined Mr. Marceca had mistakenly prepared, which she in turn sent to ORM, is attached as Exhibit B to her declaration. Wetzl Decl., ¶ 34. All of the files she archived were of persons named on the June 10, 1993 pass holder list, and (with two exceptions, Marlin Fitzwater and John Dreylinger) whose previous reports Mr. Marceca had requested while detailed to OPS. Swails-Brown Decl., ¶¶ 38-39 & Exh. Q. The inventory also shows that Billy Dale's file was among those transferred to ORM. Wetzl Decl., Exh. B at 4.

The set of work papers that Mr. Marceca left behind in the OPS vault, which Ms. Wetzl archived together with the files he had accumulated, is attached as Exhibit C to her declaration. Wetzl Decl., ¶ 35. Ms. Wetzl can identify Exhibit C as Mr. Marceca's work papers, for at least three reasons. First, the post-it note with the notation "Update Project as of 1/94 -- Marceca," written in Ms. Wetzl's own hand, appears atop the set of work papers on the file jacket labeled "American Telephone & Telegraph." Second, Mr. Marceca's handwriting appears on many of the documents that follow. Third, the work papers include numerous lists and

memoranda that Mr. Marceca prepared on the laptop computer he used while working at OPS. Id.

The work papers are also separated into twelve distinct files that correspond to the twelve federal and non-federal offices on the June 10, 1993 pass holder list (see supra at 14-15), whose employees were the subjects of the Update Project.[23] Most notably, however, within this set of Mr. Marceca's work papers are the constituent pages of the June 10, 1993 pass holder list that Mss. Gemmell, Wetzl and Anderson have all identified as the list that Ms. Gemmell obtained for the sole purpose of conducting the Update Project. Gemmell Decl., ¶ 16; Wetzl Decl., ¶ 30; Anderson Dep. at 102:15-104:1.[24]

By September 1995, Ms. Wetzl had completed the Update Project, but, in the course of doing so, discovered that a small number of the files that she had archived in December 1994 concerned persons who continued to require access to the White House complex. She retrieved those files and returned

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[23] Wetzl Decl., Exh. C at CGE 056055, CGE 056060, CGE 056067, CGE 056071, CGE 056102, CGE 056107, CGE 056148, CGE 056150, CGE 056152, CGE 056154, CGE 056197, CGE 056208.

[24] Compare, e.g., Gemmell Decl., Exh. A (the June 10, 1993 list) to Wetzl Decl., Exh. C at CGE 056058, CGE 056064, CGE 056068, CGE 056072-087, CGE 056095-100, CGE 056103-104, CGE 056149, CGE 056151, CGE 056153, CGE 056186-194, CGE 056205, CGE 056222-224.

them to the system of active files in the OPS vault. Wetzl Decl., ¶ 37. The rest remained in ORM. See Wetzl Decl., ¶ 36; Livingstone Decl., ¶ 36. Apparently no one outside OPS -- including the Counsel's Office, the only other White House office with authority to retrieve these files[25/] -- even knew of the files' existence until the events in question here came to light. Wetzl Decl., ¶ 37; Anderson Dep. at 269:13-270:13; Livingstone Decl., ¶ 36; Kennedy Dep. at 246:12-24; Nussbaum Decl., ¶ 10.

The White House Discovers the Files and Transfers Them to the FBI.

On May 30, 1996, the White House produced approximately one thousand pages of documents to the House of Representatives Committee on Government Reform and Oversight, in connection with the committee's investigation of the Travel Office matter. Deposition of Jane C. Sherburne, dated September 9, 1996 ("Sherburne Senate Dep.") at 106 (Def. Exh. 27). These documents included what the Counsel's Office understood from ORM to be "personnel" materials related to Billy Dale. Id. at 95:19-100:9, 105:20-106:17, 109:15-111:24, 121:15-124:19. In fact, these documents included Mr. Dale's

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[25/] See Declaration of Hugh Thomas Taggart, Jr., dated November 23, 1998 ("Second Taggart Decl."), ¶ 3 (Def. Exh. 26).

personnel security file (which Lisa Wetzl had transferred to ORM for archival storage) (see supra at 39-40), containing both the FBI previous report that Mr. Marceca obtained on Mr. Dale during the Update Project, and the form showing that Mr. Dale's previous report had been requested in December 1993, seven months after his employment at the White House had ended. Id. at 109:15-110:19.

Late in the day on June 4, 1996, Jane Sherburne, then Special Counsel to the President, read a press report that, according to then-Representative William Clinger, Chairman of the House Government Reform and Oversight Committee, the White House production included Billy Dale's FBI background summary report, obtained by the White House long after Mr. Dale had been terminated. Sherburne Senate Dep. at 125:13-126:20. The following day, after reviewing the White House production and determining what documents Chairman Clinger had been referring to, Ms. Sherburne contacted Craig Livingstone and asked him to find out why Mr. Dale's background report had been requested in December 1993, so long after his White House employment had ended. Id. at 126:21-128:12; see Livingstone Decl., ¶ 42.

Seeking the answer to that question, Mr. Livingstone began reviewing lists of files transferred from OPS to ORM, as a result of which he realized for the first time that in the

course of the Update Project, OPS staff had acquired previous reports on persons who had never worked for the Clinton Administration. He promptly notified the Counsel's Office of the situation. Livingstone Decl., ¶ 42. The White House decided on June 6, 1996, to return the files containing these background reports to the FBI. Declaration of Sally P. Paxton, dated December 4, 1998 ("Paxton Decl."), ¶ 2 (Def. Exh. 28).

ORM staff located the boxes that their records indicated might contain the files in question, including the two boxes of personnel security files created by Mr. Marceca that Lisa Wetzl had archived in December 1994. Counsel Office attorneys, together with FBI personnel who had arrived at the White House to retrieve the files, cross-checked the files in the boxes against the inventories that Ms. Wetzl had prepared. Paxton Decl., ¶¶ 2-4; see Declaration of Hugh Thomas Taggart, Jr., dated January 17, 1997 ("First Taggart Decl."), ¶ 5 (Def. Exh. 29).[26/]

The boxes contained all but nine of the 341 files on the inventory (and an additional one not listed). Pink "charge-out" cards in the boxes, see Second Taggart Decl., ¶ 4,

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[26/] Mr. Taggart's first declaration was originally filed in connection with the Government Defendants' Motion To Dismiss and for Summary Judgment, dated January 17, 1997.

indicated that seven of the files had been retrieved by Lisa Wetzl in 1995.[27] Mr. Livingstone checked out two additional files (of Mr. Dale, and John Dreylinger, another discharged Travel Office employee) on June 5 and 6, 1996, in connection with the investigation of the Travel Office matter. Paxton Decl., ¶¶ 5-7 & Exh. A; see also Def. Exh. 30 at FBI 002369, 002372 (FBI inventory showing charge-out cards). At the end of the second box were Mr. Marceca's work papers that Ms. Wetzl had stored together with the files. Paxton Decl., ¶ 8; see also Def. Exh. 30 at FBI 002372 (FBI inventory listing file folders contained in Marceca work papers). After the inspection of the boxes was complete, the FBI's personnel departed with the boxes and their entire contents, including Mr. Marceca's workpapers. Id., ¶¶ 9-10 & Exh. B.[28]

On June 11, 1996, the FBI sent a list to the White House of 138 additional requests for previous reports that had been

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[27] These were doubtlessly the files Ms. Wetzl returned to the OPS vault when she discovered, in the course of completing the Update Project, that the individuals in question still required White House access. Supra at 41; Wetzl Decl., ¶ 36.

[28] Several days later, on June 10, 1996, the White House transferred two additional files to the FBI, those of Mr. Dreylinger and another former Travel Office employee, Barnaby Brasseux. Paxton Decl., ¶ 11 & Exh. C. The original Dale file was turned over to the Office of Independent Counsel ("OIC") on June 6, 1996. Sherburne Senate Dep. at 141-42; Def. Exh. 31 at FBI 000295.

made during the same time frame as the requests for the previous reports returned on June 6, 1996. At the FBI's request, the White House attempted to determine whether these additional persons still required access at the time the White House sought copies of their background reports. Paxton Decl., ¶¶ 12-14 & Exhs. D, E. On June 13, 1996, the White House returned personnel security files to the FBI on the 71 individuals whose previous reports the White House concluded had been mistakenly requested. Id., ¶¶ 15-16 & Exh. F. All 71 of these files were of persons whose previous reports had been requested during Mr. Marceca's detail, and who, like the 341 persons whose files Ms. Wetzl had archived in December 1994, are named on the June 10, 1993 pass holder list. Swails-Brown Decl., ¶¶ 38-39 & Exh. R.[29/]

Once the White House completed its transfer of these files to the FBI, the Bureau prepared photocopies of the files, and on June 26, 1996, transferred the original files to the Office of Independent Counsel. Cignoli Decl., ¶¶ 4-8.

[29/] The same is true for Barnaby Brasseux, one of the two individuals whose files the White House transferred to the FBI on June 10, 1996. Swails-Brown Decl., Exh. H at 6, Exh. K at 42. Mr. Marceca evidently prepared a file (and a request form) for the second individual, John Dreylinger, but in the end neither requested nor obtained a previous report on him. See Def. Exh. 13 at 13; Def. Exh. 31 at FBI 000295; Def. Exh. 32 at FBI 000277.

Mr. Marceca's work papers were also turned over to OIC, which returned them to the White House on September 24, 1996. Declaration of Miriam R. Nemetz dated October 23, 1998, ¶¶ 3-6 & Exh. A (Def. Exh. 33). That same day, the White House produced the work papers (which it had not kept copies of) (Paxton Decl., ¶ 10) to the House and Senate committees investigating the FBI files matter. Id., ¶ 4. Thus, Mr. Marceca's work papers, containing the constituent pages of the June 10, 1993 pass holder list that Ms. Gemmell had obtained, did not resurface until four days before the House Government Reform and Oversight Committee issued its interim report on this affair.[30/]

PROCEEDINGS TO DATE

As a result of these events, plaintiffs filed suit on September 12, 1996, alleging in Counts I and II of their complaint that the FBI and the Executive Office of the President ("EOP") violated their rights under the Privacy Act, 5 U.S.C. § 552a. Additionally, they maintain in Count III that Messrs. Nussbaum, Livingstone and Marceca, and First Lady Hillary Rodham Clinton, committed tortious invasion of privacy

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[30/] Investigation into the White House and Department of Justice on Security of FBI Background Investigations, H.R. Rep. No. 862, 104th Cong., 2d Sess. (Sept. 28, 1996) ("House Report") (Pl. Exh. 10).

by "willfully and intentionally obtaining . . . Plaintiffs' FBI files" for reasons that were "politically motivated (e.g., to obtain potentially embarrassing and/or damaging information on former Bush and Reagan Administration personnel)." Complaint, Alexander v. FBI, No. 96-2123 (D.D.C.) ("Alexander"), filed September 12, 1996, ¶¶ 39-41.[31/]

On February 18, 1997, the Attorney General, through her designee, certified that plaintiffs' invasion of privacy claim had arisen from conduct performed by Messrs. Nussbaum, Livingstone and Marceca within the scope of their federal government employment. See Certification of Deputy Assistant Attorney General Eva M. Plaza, attached to Notice of Substitution, dated February 18, 1997. Pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (a.k.a. the "Westfall Act"), the United States simultaneously filed a Notice of Substitution which, by operation of law, caused the United States to be substituted in place of Messrs. Nussbaum, Livingstone and Marceca as defendant to plaintiffs' invasion of privacy claim. 28 U.S.C.

[31/] By Order dated October 17, 1997, the Court consolidated Alexander with the later filed Grimley v. FBI, No. 97-1288 (D.D.C.) ("Grimley"). For present purposes, the allegations in Grimley are in all material respects identical to the matters alleged in Alexander.

§ 2679(d)(1); see Memorandum and Order dated August 12, 1997 ("August 12, 1997 Order") at 1.

The United States also moved to dismiss plaintiffs' tort claim against it for failure to exhaust administrative remedies, as required by the Federal Tort Claims Act, 28 U.S.C. § 2675(a).[32] Plaintiffs opposed the government's motion to dismiss on the asserted ground that obtaining their FBI files for partisan political purposes lay outside the scope of the individual defendants' federal employment, and, therefore, that substitution of the United States was improper.[33]

In its June 12, 1997 Memorandum Opinion, the Court deferred ruling on the United States' motion to dismiss, concluding that plaintiffs were entitled to an opportunity for discovery on their theory that the individual defendants had acted outside the scope of their employment, before the Court reached the merits of the Attorney General's certification. Alexander v. FBI, 971 F. Supp. 603, 611 (D.D.C. 1997). The Court suggested that it would accept the substitution of the

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[32] See Memorandum of Points and Authorities in Support of the United States' Motion To Dismiss for Failure To Exhaust Administrative Remedies, dated February 18, 1997, at 4-5.

[33] Plaintiffs' Opposition to the United States' Motion To Dismiss for Failure To Exhaust Administrative Remedies, dated March 4, 1997, at 4-7.

United States if the acquisition of plaintiffs' FBI background summary reports was the end result of "bureaucratic bungling," rather than an act undertaken "for partisan political purposes." Id.[34]

Following this decision, the Court issued its August 12, 1997 Order, setting an initial six-month period for the completion of discovery on scope of employment (and class certification), during which plaintiffs and defendants each were collectively entitled to a presumptive limit of 20 depositions. More than a year later, having exhausted their allotted number of depositions,[35] plaintiffs moved for leave to depose an unspecified number of additional witnesses before resolution of the substitution and class certification issues. Plaintiffs' Motion for Authorization To Take Additional

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[34] Plaintiffs had also moved to certify this case as a class action. The Court deferred ruling on that issue as well, pending the initial period of discovery. Alexander, 971 F. Supp. at 611-12.

[35] The parties later concurred in an 81-day extension of the initial discovery period, from February 12 to May 4, 1998, see Joint Notice by the Government Defendants and Plaintiffs Regarding Pending Motions for Extensions of Time, dated January 9, 1998, although the Court never entered an order ratifying the parties' agreed-upon extension of the discovery deadline. By May 4, 1998, plaintiffs still had not completed the 20 depositions allowed them by the Court's August 12, 1997 Order. Despite the fact that the agreed-upon deadline had passed, the defendants acceded to plaintiffs' continued pursuit of discovery until they exhausted their permitted number of depositions.

Depositions, dated October 14, 1998. The Court refused to give plaintiffs an unlimited mandate to conduct further depositions, noting that they had already taken the depositions of 26 individuals, and recently had been given leave to depose two more (Deborah Gorham and Betsy Pond), but nevertheless granted them leave to depose up to five additional witnesses. Memorandum and Order dated April 21, 1999 ("April 21 Order") at 4-5. The Court also set a June 12, 1999 deadline for the completion of discovery on the substitution and class certification issues. Id. at 7.[36]

Plaintiffs have now deposed more than 30 witnesses in this action, some on multiple occasions. Over 22 months of discovery, they also served more than 200 separate document requests on the government defendants,[37] another 50 requests on the First Lady,[38] and hundreds of additional requests on

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[36] By its Order dated June 22, 1999, the Court, effectively extended that deadline, in part, until July 16, 1999.

[37] See Plaintiffs' First, Second, Fourth and Fifth Requests for Production of Documents to Defendant [EOP], dated, respectively, October 9, 1997, October 27, 1998, and May 11 and 13, 1999; Plaintiffs' First Set of Requests for Production of Documents to Defendant [FBI], dated October 9, 1997; and Plaintiffs' Third Request for Production of Documents to Defendants [EOP and FBI], dated May 11, 1999.

[38] See Plaintiffs' First and Second Requests for Production of Documents to Defendant Hillary Rodham Clinton, (continued...)

numerous third parties and non-party witnesses (including the Secret Service and the Department of Defense), in response to which they have received tens of thousands of pages of documents.[39/] As the Court observed in its April 21 Order, plaintiffs have had "more than satisfactory leeway to fully examine" the substitution and class certification issues. April 21 Order at 6.

ARGUMENT

I. PLAINTIFFS' CHALLENGE TO THE ATTORNEY GENERAL'S SCOPE-OF-EMPLOYMENT CERTIFICATION MUST BE REJECTED.

A. Legal Framework

Plaintiffs continue to challenge the United States' substitution on the ground that their invasion of privacy claim arises from conduct of Messrs. Nussbaum, Livingstone and Marceca falling outside the scope of their former federal

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[38/](...continued)
dated, respectively, October 9, 1997 and October 27, 1998.

[39/] See, e.g., Subpoena to the Department of Defense dated April 14, 1998 (59 requests); Notices of Depositions Duces Tecum of Clifford Bernath, dated April 14, 1998 and May 27, 1999 (74 requests); Subpoena to and Notice of Deposition of Ken Bacon, dated May 6, 1998 and May 17, 1999, respectively (together, 67 requests); Notice of Rule 30(b)(6) Deposition of the United States Secret Service (undated) (22 requests); Notice of Deposition Duces Tecum of James Carville, dated February 24, 1998 (36 requests); Re-Notice of Deposition of George Stephanopoulos, dated March 4, 1998 (36 requests); Notice of Deposition Duces Tecum of Harold Ickes, dated May 1, 1998 (60 requests).

employment. Pl. Mem. at 116-21. For purposes of the Westfall Act, whether tort claims against federal employees are based on conduct performed within the scope of their employment is resolved according to the principles of respondeat superior in the state where the alleged tort occurred. If the conduct is such that a private employer would be held liable for an employee's actions under state law, the conduct falls within the scope of employment under the Westfall Act. See Haddon v. United States, 68 F.3d 1420, 1423 (D.C. Cir. 1995).

In prior briefing, the United States has discussed in detail the broad principles of respondeat superior applied in the District of Columbia, where the tortious conduct alleged in this action took place.[40/] To determine whether alleged conduct is within the scope of employment for purposes of the respondeat superior doctrine, courts in the District of Columbia follow the legal principles set forth in the Restatement (Second) of Agency ("Restatement"). Haddon, 68 F.3d at 1423; Johnson v. Weinberg, 434 A.2d 404, 408 (D.C. 1981). The analysis turns on whether the employee's alleged conduct is of the kind he is employed to perform, occurs

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[40/] Memorandum of Points and Authorities Replying to Plaintiffs' Opposition to the United States' Motion To Dismiss and Seeking Dismissal of Plaintiffs' Challenge to the Substitution of the United States for Defendants Nussbaum, Livingstone, and Marceca, dated March 19, 1997, at 5-10.

substantially within the authorized time and space limits of his employment, and is actuated, at least in part, by a purpose to serve the employer. Restatement, § 228.

These criteria are liberally applied to hold employers accountable for a broad range of employee conduct.[41] In this case, the parties differ only so far as the third criterion is concerned, whether Messrs. Nussbaum, Livingstone and Marceca acted with a purpose to serve their employer when the White House obtained plaintiffs' FBI background reports. The Court has expressed its view that if the defendants intentionally acquired plaintiffs' background reports "for partisan political purposes," then they were not acting with a purpose to serve the legitimate interests of the United States. On the other hand, if they were guilty of no more than "bureaucratic bungling" in carrying out their legitimate duties and responsibilities as federal employees, then they acted within the scope of their employment. Alexander, 971 F. Supp. at 611.

The onus of demonstrating that the defendants' conduct was in fact motivated by a purpose to acquire embarrassing

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[41] District of Columbia v. Davis, 386 A.2d 1195, 1203-04 (D.C. 1978). See Lyon v. Carey, 533 F.2d 649, 652-54 (D.C. Cir. 1976); Johnson v. Weinberg, 434 A.2d at 408-09; Meyers v. National Detective Agency, Inc., 281 A.2d 435, 436 (D.C. 1971).

and/or damaging information about political opponents of the Clinton Administration lies with plaintiffs. Although subject to judicial review, the Attorney General's certification constitutes prima facie evidence that Messrs. Nussbaum, Livingstone and Marceca were acting within the scope of their employment. As such, it shifts the burden of rebutting the certification to the plaintiffs, who must prove that the defendants' conduct was not within the scope of their employment. Kimbro v. Velten, 30 F.3d 1501, 1509 (D.C. Cir. 1994).[42/] And now that they have been given "more than satisfactory leeway" to examine the scope of employment issue, April 21 Order at 6, plaintiffs must

> come forward, as if responding to a motion for summary judgment, with competent evidence [of the] . . . facts necessary to support a conclusion that the defendant[s] acted beyond the scope of [their] employment. If the plaintiff[s] fail[ ] to tender such evidence, the statute requires that substitution be ordered.

Melo v. Hafer, 13 F.3d at 747 (emphasis added); see also Kimbro, 30 F.3d at 1509 (expressly adopting the Third

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[42/] See also Gutierrez de Martinez v. DEA, 111 F.3d 1148, 1153-1155 (4th Cir.), cert. denied, 522 U.S. 931 (1997); Palmer v. Flaggman, 93 F.3d 196, 199 (5th Cir. 1996); RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1143 (6th Cir. 1996); McAdams v. Reno, 64 F.3d 1137, 1145 (8th Cir. 1995); Melo v. Hafer, 13 F.3d 736, 742 (3d Cir. 1994); Hamrick v. Franklin, 931 F.2d 1209, 1211 (7th Cir. 1991); S.J. & W. Ranch, Inc. v. Lehtinen, 913 F.2d 1538, 1543 (11th Cir. 1990).

Circuit's approach to resolution of scope challenges); Smith v. Pena, No. 93-0281, 1998 WL 164774, *16 (D.D.C. Mar. 13, 1998) (refusing to consider hearsay evidence in deciding scope-of-employment question). It is therefore sufficient to dispose of plaintiffs' scope challenge to observe that, even after exhaustive discovery, they have uncovered no evidence whatsoever to support their claim that the individual defendants obtained plaintiffs' FBI background reports pursuant to any partisan political conspiracy.

Nevertheless, even though it is not the government's burden here to disprove plaintiffs' allegations, the United States now has presented overwhelming evidence that Mr. Marceca, with little or no involvement by Mr. Livingstone, and none by Mr. Nussbaum (or the First Lady), obtained the FBI background reports of persons not working for the Clinton White House due solely to an unwitting administrative error. Plaintiffs' challenge to the Attorney General's scope-of-employment certification must therefore be rejected.

B. OPS Obtained the FBI Background Reports of Former Reagan and Bush Administration Employees Due to Bureaucratic Error, Not Political Malfeasance.

1. Anthony Marceca inadvertently acquired the background reports of persons no longer working at the White House, because in the course of working on the Update Project he relied on the

June 10, 1993 pass-holder list that Nancy Gemmell obtained from the Secret Service.

Anthony Marceca has been sued for obtaining the FBI background reports of persons who no longer worked at the White House. He acquired background reports on these individuals (and on persons who continued to work at the White House) in the course of his labors on the Update Project. The Update Project was a routine OPS procedure undertaken at each change of administration to carry out one of the primary missions of that office -- maintaining personnel security files on those having routine access to the White House. See supra at 11-14; Gemmell Decl., ¶¶ 6-9, 11; Wetzl Decl., ¶¶ 6, 15; Anderson Dep. at 74:3-78:18; Livingstone Decl., ¶¶ 11, 20-21.

The objective nature of Mr. Marceca's activities -- the yardstick by which his intentions should be judged[43/] -- brings to light the simple truth that his acquisition of plaintiffs' background reports was the result of a well-intentioned, but ill-fated effort to carry out the Update Project as it always had been in the past, according to the instructions received from Nancy Gemmell. In particular, Mr. Marceca mistakenly

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[43/] See Restatement, § 235 comment a ("it is only from the manifestations of the servant and the circumstances that, ordinarily, his intent can be determined").

obtained the background reports of persons no longer working at the White House because he followed Ms. Gemmell's instruction to use the June 10, 1993 Secret Service pass holder list that she had specifically acquired for purposes of the Update Project, a list that no one knew at the time was a list of both active and inactive White House pass holders. Thus, the conduct complained of in this action took place while Mr. Marceca "was performing a service in furtherance of his employer's [legitimate] business." District of Columbia v. Davis, 386 A.2d at 1203. That being the case, his conduct fell within the scope of his employment.

The evidence that Mr. Marceca relied on the June 10, 1993 pass holder list obtained by Ms. Gemmell is assorted, and conclusive. Initially, there is no room for doubt that Exhibit A to Ms. Gemmell's declaration is, in fact, the list that she obtained; that she relied on to make previous report requests for the employees of nine different government agencies and private sector employers with personnel stationed at the White House; and that she then left behind with the intent that her successor continue to use it in carrying out the project. See supra at

14-22; Gemmell Decl., ¶¶ 13-20 & Exh. A; Wetzl Decl., ¶¶ 30, 31; Anderson Dep. at 88:3-92:15, 95:6-100:22, 103:5-104:1.[44/]

It is just as certain that Mr. Marceca relied on a Secret Service pass holder list as the basis for his work on the Update Project, as his OPS colleagues witnessed, see Wetzl Decl., ¶ 22; Anderson Dep. at 94:5-95:5, and that this list was none other than the one Ms. Gemmell had left behind. When she met with Mr. Marceca, just prior to his detail, to brief him generally on OPS duties and procedures, Ms. Gemmell specifically directed his attention to the June 10, 1993 pass holder list as the list to be used for the Update Project. See supra at 24; Gemmell Decl., ¶¶ 27-28. The constituent pages of that list were among the work papers that Mr. Marceca left behind once his OPS detail ended, supra at 35; that Ms. Wetzl sent to the Office of Records Management, with the files he had mistakenly accumulated, supra at 39-41; Wetzl Decl., ¶¶ 23, 34 & Exhs. B, C; and that were discovered in June 1996, when the boxes containing those files were retrieved from ORM and transferred to the FBI. See supra at 44-45; Paxton Decl.,

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[44/] Ms. Gemmell served in the White House under four Republican Presidents, and in OPS under two (Reagan and Bush). Gemmell Decl., ¶¶ 2-3. That her intention in obtaining the list was to see the Update Project carried out in a manner consistent with its legitimate purposes is beyond any conceivable doubt.

¶¶ 8-10; Nemetz Decl., ¶ 6; Def. Exh. 30 at FBI 002372. Those papers included no other Secret Service pass holder list of any kind. See Wetzl Decl., Exh. C.

The documentary record of Mr. Marceca's progress on the Update Project further hardens this conclusion. As discussed above, supra at 39-41, in December 1994, Ms. Wetzl archived 341 personnel security files that she determined Mr. Marceca had established on persons not longer working at the White House. Wetzl Decl., ¶¶ 33-34 & Exh. B. Each of these 341 individuals was named on the June 10, 1993 pass holder list. Swails-Brown Decl., ¶ 39 & Exh. Q. Between June 11 and 13, 1996, the White House discovered an additional 71 files that Mr. Marceca had also established on persons not working at the White House. See supra at 41; Paxton Decl., ¶¶ 12-16 & Exh. F. Each of these 71 persons was also named on the June 10, 1993 list. Swails-Brown Decl., ¶¶ 38-39 & Exh. R. In fact, of the 1,137 requests for previous reports made during Mr. Marceca's detail to the White House, 1,121 of them (almost 99 percent) were of pass holders named on the June 10, 1993 list, Supra at 27-28; Swails-Brown Decl., ¶ 27(c).[45/] Manifestly,

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[45/] The names of the remaining 16 individuals can be located on the list of previous reports requests prepared by the government. Swails-Brown Decl., Exh. K at 22, 24, 29, 33, 35, 39, 41, 45, 46, 48, 52, 60. They are identifiable by the (continued...)

then, Mr. Marceca relied on Ms. Gemmell's June 10, 1993 pass holder list to identify the persons whose background reports he was supposed to request.

As the Secret Service analysis indicates, that list was a roster of active and inactive pass holders. See supra at 17; Moffat Decl., ¶¶ 14-18.[46/] Equally clear is the fact that, at the time in question, Mr. Marceca had no way of knowing this. The June 10, 1993 list does not indicate whether the persons named are active or inactive pass holders. Supra at 17-18; Moffat Decl., ¶ 14; Gemmell Decl., ¶ 20 & Exh. A; Anderson Dep. at 101:1-12. For this very reason, the OPS staff, including so knowledgeable an employee as Ms. Gemmell, see supra at 10, assumed that the list included only those persons whom the Secret Service's WAVES database identified as active pass holders. Gemmell Decl., ¶ 20; Anderson Dep. at 89:21-90:15, 101:13-102:9.

Based on her wealth of prior experience, Ms. Gemmell had reason to anticipate that the list might to some extent be inaccurate. But, when she briefed Mr. Marceca shortly before

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[45/](...continued)
lack of an entry in the "Agency" column of the list. See id., ¶¶ 14-15.

[46/] Regarding the 1996 testimony the Secret Service gave in this matter before the House Government Reform and Oversight Committee, see infra at 87-95.

her retirement, she did not explain that whoever took over the Update Project should wait until after the color change of White House passes, and obtain a new and more reliable list, before seeking previous reports on persons employed within high-turnover White House offices. See supra at 18-19; Gemmell Decl., ¶¶ 27-28.

There is no reason, then, to expect that Mr. Marceca, a temporary detailee having no prior experience in OPS, would have any different or better understanding of the true nature of the June 10, 1993 list than the full-time OPS staff members with whom he worked, or, in particular, Ms. Gemmell, who had years of experience with Secret Service lists of this and similar kind.

It follows instead that Anthony Marceca acquired the background reports of current and former employees at the White House due to his reliance on a Secret Service list, originally acquired by Ms. Gemmell, which unbeknownst to him included active and inactive pass holders in the Secret Service database. That is the only conclusion that squares with the direct evidence of what actually occurred in OPS in 1993. See also § I.C, infra.

When he relied on the June 10, 1993 list as the foundation for his work on the Update Project, Mr. Marceca was

simply following the example and carrying out the intentions of Nancy Gemmell. See Gemmell Decl., ¶¶ 28, 30. In fact, the record of his actions reveals that Mr. Marceca tried in every respect to carry out the Update Project in accordance with its proper purpose, past practice, and Ms. Gemmell's instructions. First, he submitted requests almost exclusively for previous reports on personnel of the four employers on the June 10, 1993 list -- NSC, the Executive Residence, GSA, and the White House Office -- that Ms. Gemmell either did not begin, or did not complete, before she retired. See supra at 21-22, 27-30; Gemmell Decl., ¶¶ 21, 25; Swails-Brown Decl., Exh. K at 2-12; id., ¶ 28 (1,116 of 1,137 requests during Mr. Marceca's tenure were for reports of persons employed by the NSC, the Residence, GSA, or White House Operations).[47/]

Second, as he worked his way through the names on the list, he skipped the names of temporary pass holders, and new personnel hired after the change of administration, see supra at 30-31, consistent with the past practice and purpose of the Update Project to focus solely on holdover employees. Gemmell Decl., ¶ 15; Livingstone Decl., ¶¶ 45-46. Aside from these

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[47/] He likewise separated his work papers into 12 file folders corresponding to these 12 employer-offices identified on the June 10, 1993 list. See supra at 40-41; Wetzl Decl., Exh. C.

two categories of employees, he submitted requests for virtually every other person named on the list (so far as he progressed before his detail ended). Swails-Brown Decl., ¶ 37. Apparently, he made no attempt to exercise discretion, beyond the instructions he had received, as to whose previous reports should or should not be requested in connection with the Update Project. Third, and even more revealing, when it appeared that he had obtained previous reports on persons no longer working at the White House, Mr. Marceca did not conceal that fact, but evidently brought it to the attention of Ms. Anderson, his superior in the office (the Executive Assistant), who has never been accused of involvement with the partisan political scheme alleged in this case. Supra at 31-33; Anderson Dep. at 269:11-270:6.[48/] He consulted with Ms. Anderson (and possibly other staff members) about what could be done to detemine if pass holders on the list remained at the White House before he asked the FBI for their previous

[48/] Mr. Marceca became aware of this fact as a result of circulating memoranda to GSA, NSC and the Residence, inquiring, inter alia, whether persons whose previous reports he had received still worked at the White House. In this regard, too, he was following the same procedures as Nancy Gemmell. See supra at 32-33; Anderson Sen. Dep. at 84-91, 154-56; Def. Exh. 23.

reports. Id. at 138:4-139:14, 272:10-14.[49/] This is not the conduct of someone seeking to pervert the authorized purposes of the Update Project, but of someone seeking to carry them out.

In sum, the direct evidence of Mr. Marceca's activities, including the testimony of his co-workers within OPS, and the documentary record of the work he performed, shows that in carrying out the routine procedure known as the Update Project, he attempted at all times to follow established practice, and the instructions passed along by Nancy Gemmell. That included using the June 10, 1993 pass holder list to identify the persons whose previous reports he should request, with the exceptionally unfortunate and regrettable outcome of obtaining background reports on persons who no longer worked at the White House.

But Ms. Gemmell was a 12-year veteran of OPS with vast experience. The entire staff knew that to follow in her

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[49/] When it came to disposing of background reports that Mr. Marceca had already obtained, but which OPS did not require, he segregated them, once again in apparent consultation with Ms. Anderson, and had them slated for archiving. Ms. Gemmell had prescribed just this procedure for similar situations where, on occasion, OPS requested background information on individuals working at the White House but who departed before their background materials were received from the FBI. See supra at 33-34; Anderson Dep. at 143:10-22, 146:16-147:4, 271:18-271:1, 273:10-274:2, 387:13-18; Livingstone Decl., ¶ 14.

footsteps was to follow proper procedure. The fact that Anthony Marceca also did just that demonstrates that his purpose in relying on the pass holder list that she had pointed out to him was to further the legitimate business of his employer as he understood it, Johnson v. Weinberg, 434 A.2d at 408, and that his acquisition of plaintiffs' background reports was inadvertent. Accordingly, the tort claims against him are based on conduct that occurred within the scope of his employment.

2. Craig Livingstone neither directed Mr. Marceca to obtain, nor was he aware that Mr. Marceca had obtained, background reports on persons who never worked at the Clinton White House.

Craig Livingstone never sought to obtain or use, was never asked to obtain or use, and never asked anyone else to obtain or use FBI background reports for any improper purpose. He never requested or obtained FBI previous reports on any plaintiff or any other member of the alleged class, nor was he asked to do so, and nor did he instruct anyone else to do so. These are Mr. Livingstone's sworn affirmations. Livingstone Decl., ¶¶ 47-48; see also id., ¶ 43. And there is not one line of testimony to the contrary. There is not a single witness who has said, or could say, that Craig Livingstone ever obtained or misused FBI background information, that he

was ever instructed to do so, or that he ever directed anyone else to do so.

Far from orchestrating the acquisition of plaintiffs' background reports, Mr. Livingstone was not even aware that Mr. Marceca had obtained previous reports on persons who had never worked at the Clinton White House until June 1996, when, in trying to sort out why Billy Dale's background report had been requested in December 1993, he first discovered the precise nature and magnitude of Mr. Marceca's error. Livingstone Decl., ¶ 42. This fact should come as no surprise, because Mr. Livingstone did not personally review the request forms that Mr. Marceca used to obtain previous reports from the FBI. Id. ¶ 23. Nor did he review the previous reports that Mr. Marceca acquired in connection with the Update Project, or otherwise personally supervise this low-priority task within his office. Id., ¶¶ 29-30.[50/] To the best of Mr. Livingstone's knowledge and belief, OPS inadvertently obtained the background summary reports of persons who never worked at the Clinton White House because,

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[50/] Mr. Marceca, like the rest of the OPS staff, submitted monthly reports to Mr. Livingstone of his progress on the various matters in the office, including, but not limited to, the Update Project, to which he had been assigned. However, these status reports did not identify whose previous reports Mr. Marceca had obtained. See Livingstone Decl., ¶ 29 Exh. D.

when working on the Update Project, Mr. Marceca used what he mistakenly thought to be a list of active pass holders, but which in fact was a list containing hundreds of individuals whose White House passes were inactive. Id., ¶ 44.

Thus, the sole acts in which Mr. Livingstone engaged that can be said in any way to have resulted in the acquisition of FBI background reports on persons no longer working at the White House were, first, to direct Nancy Gemmell (at her suggestion) to begin the Update Project, and, second, to request that Anthony Marceca be detailed to OPS, where he assumed responsibility for the Update Project after Ms. Gemmell retired. See supra at 14, 23-24. Both of these decisions were made "in virtue of [Mr. Livingstone's] employment and in furtherance of its ends," and so fall within the scope of his employment as Director of OPS. Penn Central Transp. Co. v. Reddick, 398 A.2d 27, 29 (D.C. 1979).

Mr. Livingstone asked Ms. Gemmell to begin the Update Project once she, the sole remaining employee with institutional knowledge of OPS duties and proper procedures, explained that it was necessary for OPS to conduct the Update Project in order to meet its responsibility of maintaining personnel security files on persons employed at the White House. Supra at 10-12, 14; Gemmell Decl., ¶¶ 6-8; Anderson

Dep. at 74:3-78:18; Livingstone Decl., ¶¶ 11, 20-21. He assigned Ms. Gemmell to the Update Project as part of his larger effort to ensure that all OPS functions had been set properly in motion before Ms. Gemmell retired. See Gemmell Decl., ¶¶ 5, 12; Wetzl Decl., ¶¶ 12-13; Anderson Dep. at 71:17-72:17; Livingstone Decl., ¶ 16. It was indisputably within the scope of Mr. Livingstone's employment as the director of the office to instruct that OPS begin the Update Project. Indeed, it would have been remiss of him not to do so.

When Mr. Livingstone asked that Anthony Marceca be detailed to OPS, he was likewise acting "in furtherance of his employer's business." District of Columbia v. Davis, 386 A.2d at 1203. It was painfully clear that OPS needed additional personnel to deal with the immense quantities of paper work it was responsible for processing to initiate FBI background investigations on new White House employees. See supra at 7-8, 10-11; Gemmell Decl., ¶ 5; Wetzl Decl., ¶¶ 13-14; Anderson Dep. at 29:10-30:3; Livingstone Decl., ¶¶ 17-19, 22. Yet Mr. Livingstone's repeated pleas for more staff were turned down, for fiscal reasons. Livingstone Decl., ¶ 19; Kennedy Dep. at 276:3-12.

When Anthony Marceca contacted Mr. Livingstone seeking a position in the White House, see Livingstone Decl., ¶ 26, he represented a solution to this dilemma. As an experienced criminal investigator with a background in military affairs and security-related matters, he would be an immediate asset when it came to processing SF-86s and other paper work for which OPS was responsible. Id. If he were detailed on a "non-reimbursable" basis, the White House would not have to pay his salary, thus mooting any budgetary objections. Id. Therefore, Mr. Livingstone asked for Anthony Marceca to be detailed in order to obtain sorely needed and able assistance with the legitimate and then-overwhelming duties of his office. Id. On this occasion as well, Mr. Livingstone acted properly within the scope of his employment as Director of OPS.[51/]

[51/] It is not clear how Mr. Marceca assumed responsibility for the Update Project. In a deposition by staff of the House Government Reform and Oversight Committee, Mr. Marceca testified that Mr. Livingstone assigned him to it. Deposition of Anthony Marceca dated June 18, 1996 ("Marceca House Dep.") at 30 (Def. Exh. 34). During Mr. Livingstone's deposition by the same committee staff, he could only recall that "at some point . . . [Mr. Marceca] picked up on the project." Deposition of David Craig Livingstone dated June 14, 1996, at 31 (Def. Exh. 35).

However, when asked if Mr. Livingstone had instructed him how the Update Project should be conducted, Mr. Marceca testified that Mr. Livingstone told him he "would be briefed

(continued...)

3. Bernard Nussbaum had no involvement in the acquisition of background reports on persons not working at the White House.

For purposes of the Westfall Act, a federal employee has acted within the scope of his employment if he did not engage in any conduct giving rise to the plaintiff's tort claim. Kimbro, 30 F.3d at 1506-08; Melo v. Hafer, 13 F.3d at 746; Deane v. Light, 970 F. Supp. 465, 467 (E.D. Va. 1997). That is the case here with Mr. Nussbaum.

Plaintiffs allege that Mr. Nussbaum "willfully and intentionally requested that Defendant FBI release Plaintiffs' confidential FBI files to Defendant The White House," and "approv[ed] in writing" the requests "made by Defendant Livingstone and/or Defendant Marceca," for "political purposes." Complaint, ¶¶ 25-26. These claims are false. Mr. Nussbaum "never obtained the FBI files or copies of previous reports with respect to any plaintiff or other member of the alleged class, nor did [he] ever approve, in writing or otherwise, any requests for such files or reports." Nussbaum

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[51]/(...continued)
on what [his] duties were" by Ms. Gemmell. Marceca House Dep. at 30. That instruction by Mr. Livingstone -- to seek guidance in the proper procedures for conducting the Update Project from Nancy Gemmell -- could have only been motivated by a desire to have the project carried out in furtherance of the legitimate business of the office that Mr. Livingstone had been hired to run.

Decl., ¶ 11; see also Nussbaum Dep. at 34:20-35:9, 45:16-46:1, 83:11-84:15, 150:1-151:12. As is true in Mr. Livingstone's case, there is not one witness who has said (or could say) otherwise.

The facts are that, until the FBI files controversy erupted in June 1996, Mr. Nussbaum "had no knowledge or information that OPS had requested or obtained any information from the FBI on individuals who were not being considered for Presidential appointments and who were not to have access to the White House." Nussbaum Decl., ¶ 10. For that matter, he was not even aware that OPS had undertaken a project involving the re-creation of personnel security files on holdover employees. Id., ¶ 9; see Nussbaum Dep. at 373:17-374:11 (he knew only that background summay reports were obtained on "potential employees").

That was the case because Mr. Nussbaum maintained only a general familiarity with the process by which FBI background information was acquired and reviewed. As Counsel to the President of the United States, he did not consider it the highest and best use of his time to become involved with the operational details of obtaining and reviewing hundreds and hundreds of FBI background reports on ordinary White House employees. Nussbaum Dep. at 233:19-234:12, 235:10-236:8,

267:1-13, 374:16-375:19. See also Anderson Dep. at 60:2-62:19. Instead, just like his predecessor, C. Boyden Gray, Mr. Nussbaum delegated the day-to-day responsibility for those matters to a subordinate, William Kennedy. Nussbaum Decl., ¶ 3; Nussbaum Dep. at 106:11-107:3, 125:8-11, 130:21-131:9.

There is one and only one reason why it has ever been suggested that Bernard Nussbaum might have had anything to do with the improper acquisition of FBI background information: his name is printed on the forms that OPS used to request previous reports from the FBI. E.g., Def. Exh. 13 at 4-16; see Complaint, ¶ 11. That is a fact, but it signifies nothing. By 1993, it had been the protocol for many years to make White House requests for FBI background information in the name of the Counsel to the President. See supra at 13-14; Gemmell Decl., ¶ 10; Wetzl Decl., ¶ 16; Anderson Dep. at 62:21-64:22; Livingstone Decl., ¶ 22; Kennedy Dep. at 221:13-222:7.[52/] During the Bush Administration, the forms were printed with the name of C. Boyden Gray, and, following Mr. Nussbaum's tenure as White House Counsel, his name was

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[52/] This was only one of a number of such formalities, originating with prior administrations, that the Clinton White House continued to observe. For example, the FBI officially addressed background reports on new employees to Mr. Nussbaum, but in fact they were delivered to Mr. Kennedy, the person responsible for reviewing them. Nussbaum Dep. at 125:6-10.

replaced by Lloyd Cutler's, and then Abner Mikva's. Wetzl Decl., ¶ 16; Anderson Dep. at 62:21-64:16, 252:6-20; see Def. Exh. 13 at 17-18.[53/]

As had also been the routine practice in prior administrations, requests for FBI background information were not reviewed by the Counsel to the President (or anyone else outside OPS, for that matter) before OPS sent them to the FBI. Gemmell Decl., ¶ 10; Wetzl Decl., ¶ 17; Anderson Dep. at 65:2-11, 172:9-173:9; Livingstone Decl., ¶ 23. As a result, during his tenure as White House Counsel Mr. Nussbaum was not even aware that his name was printed on the request forms used to obtain FBI background material. Nussbaum Decl., ¶ 8; Nussbaum Dep. at 31:11-32:4, 33:20-34:9, 36:1-18, 42:1-6, 386:2-20.

The plaintiffs do not dispute that Mr. Nussbaum had absolutely nothing to do with the acquisition of their FBI background reports. To the contrary, they acknowledge and cite to much of the evidence establishing that to be true. Pl. Mem. at 31-33. Nevertheless, they submit that Mr. Nussbaum should be held to have acted outside the scope of his

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[53/] Indeed, when Mr. Livingstone arrived in OPS in early 1993, Ms. Gemmell and Jane Dannenhauer (Mr. Livingstone's predecessor as director of the office) prepared copies of these request forms for the use of the Clinton Administration by "whiting out" C. Boyden Gray's name from the forms, and typing in Mr. Nussbaum's. Livingstone Decl., ¶ 22.

employment, on the theory that his complete lack of involvement with the events giving rise to this litigation was "intentional." He ceded his authority as White House Counsel to Mrs. Clinton, they posit, to facilitate the unlawful acquisition of FBI background information at her behest. Id. at 33-34.

As one court has observed, it is a dubious proposition that a federal employee can be stripped of his Westfall Act immunity under a theory of "deliberate inaction." Murphy v. West, 945 F. Supp. 874, 878-79 n. 9 (D. Md. 1996). But quite apart from the legal viability of that notion, plaintiffs' burden here is not to posit theories but to prove facts. Melo v. Hafer, 13 F.3d at 747. They do not cite a single piece of evidence to support this new and bewildering theory of culpability on Mr. Nussbaum's part. Pl. Mem. at 34.

The reality is that Mr. Nussbaum delegated responsibility for obtaining and reviewing FBI background reports to Mr. Kennedy, not to Mrs. Clinton. Nussbaum Dep. at 106:11-107:3. He did so with the utmost confidence in Mr. Kennedy's abilities. Id. And he did so with instructions to follow the same basic procedures followed by the previous, Republican administration, to ensure that this "sensitive" and

"important" function was handled properly. Id. at 234:10-12, 267:1-13, 390:7-18.

Bernard Nussbaum engaged in no act of commission or omission that is even remotely related to plaintiffs' tort claims. He, like Mr. Marceca, and Mr. Livingstone, should be found to have acted within the scope of his employment. Kimbro, 30 F.3d at 1506-08; Melo, 13 F.3d at 746; Deane, 970 F. Supp. at 467.

C. The Events Surrounding the Conduct of the Update Project Are Wholly Inconsistent With Plaintiffs' Allegations of a Conspiracy.

This case begins and ends with the simple fact that Anthony Marceca, when he worked on the Update Project, a standard OPS process that lay well within the scope of his employment as an OPS detailee, relied on a Secret Service list, obtained by Ms. Gemmell, which unbeknownst to him was a list of both and inactive White House pass holders. But at the same time, the record speaks clearly to numerous other facts that cannot be reconciled with plaintiffs' theories of a political conspiracy. From start to finish, the circumstances surrounding the conduct of the Update Project dispel the notion that it was carried out for partisan political purposes.

First, it was neither Mr. Nussbaum, Mr. Livingstone, nor Mr. Marceca, nor any other person hired by the Clinton Administration, who provided the impetus for the Update Project, as might be expected if there were any substance to plaintiffs' allegations of a conspiracy. Rather, it was Ms. Gemmell, a holdover employee from the Bush Administration, who advised Mr. Livingstone that OPS needed to conduct the Update Project. See supra at 11; Gemmell Decl., ¶¶ 6, 12; Anderson Dep. at 77:11-78:18; Livingstone Decl., ¶¶ 20-21. Plaintiffs can spin no credible theory of conspiracy that would involve Ms. Gemmell, herself a White House employee under four Republican Presidents, see Gemmell Decl., ¶ 3, in an effort to obtain embarrassing and/or damaging personal information about former Reagan and Bush Administration personnel with whom she served.

Second, when Mr. Livingstone first learned about the Update Project, he assigned it to Ms. Gemmell, rather than to any staff person hired by the Clinton Administration, and arranged to postpone her retirement to make sure that the Update Project (among other OPS functions) was up and running smoothly before she left. See supra at 10, 14; Gemmell Decl., ¶¶ 4-5, 12; Anderson Dep. at 71:17-73:3; Livingstone Decl., ¶ 16. As a result, the Update Project, which plaintiffs seek

to portray as a vehicle for political espionage, focused first on such non-political offices as the National Park Service, AT&T, and GSA. See supra at 18-19, 21-22; Gemmell Decl., ¶¶ 21, 25; Swails-Brown Decl., Exh. K at 2-12. Mr. Livingstone's decision to entrust the Update Project to Ms. Gemmell -- a Republican holdover whose knowledge of OPS procedures was unparalleled by anyone else on the staff at the time -- suggests that he wished the Update Project to be carried out for the same legitimate purposes as it had been in prior administrations, and not that he or anyone else viewed it as a chance to dig up dirt on Republicans. See Gemmell Decl., ¶ 31.

Third, plaintiffs' theory of the case is wholly inconsistent with the circumstances leading to Mr. Marceca's White House detail. It was Anthony Marceca who set in motion the series of events that led to his temporary employment in OPS, when he contacted Craig Livingstone in search of a position at the White House. Livingstone Decl., ¶ 26. It was Mr. Livingstone, in turn, who requested a detail for Mr. Marceca, to relieve an acute shortage of personnel (relative to the volume of paperwork that OPS was responsible for processing) without exceeding its budget. Id., ¶ 27. See generally supra at 23-24. Neither the First Lady, Mr.

Nussbaum, nor anyone else directed that Mr. Marceca be detailed to OPS to work on the Update Project, or for any other specific purpose. Kennedy Dep. at 277:24-278:6.

Fourth, if, in fact, Anthony Marceca was supposed to work on the Update Project as part of an illicit scheme hatched by his superiors at the White House, then he should have treated the Update Project as his top priority immediately upon his arrival, and focused his efforts from the outset on employees of the White House Office. The White House Office includes the President's (any President's) immediate personal staff and his most senior advisors and assistants. See Meyer v. Bush, 981 F.2d 1288, 1293 & n. 3 (D.C. Cir. 1993). These persons should have been the primary targets of the Update Project as plaintiffs conceive it. Yet quite the opposite occurred.

Although he started work in OPS on August 18, 1993, Mr. Marceca submitted no requests for previous reports (with the possible exception of two) until nearly a month later, on September 14, 1993, Swails-Brown Decl., Exh. K at 12, after he had first reduced the backlog of SF-86s on new employees. That was the higher priority project in the office to which Mr. Livingstone had always intended that Mr. Marceca would first devote his attention. See supra at 25; Livingstone Decl., ¶¶ 25, 26, 28; Wetzl Decl., ¶¶ 21, 24-25; Anderson Dep.

at 51:9-52:6, 117:5-13. And, when Mr. Marceca finally made a start on the project, for nine days between September 14 and 23, 1993, he requested previous reports on employees of the Executive Residence, and the NSC, rather than direct his efforts immediately at the White House Office. Swails-Brown Decl., Exh. K at 12-29. See generally supra at 28-29.

After receiving just nine days' attention, the Update Project again fell by the wayside for more than another month, until October 29, 1993. Swails-Brown Decl., Exh. K at 29. By this time, almost two and one-half months had passed since Mr. Marceca's detail had started, and still he did not veer toward the politically fertile territory of the White House Office. Instead, he next submitted requests for previous reports on employees of the GSA, one of the most apolitical group of pass holders on the June 10, 1993 list. Id., Exh. K at 29. And he spent nearly a month doing so, until November 27, 1993. Id., Exh. K at 29-39. That is to say, he spent a month obtaining previous reports that promised no conceivable payoff in terms of confidential information about partisan adversaries of the White House. See generally supra at 28-29.

The short of it is that Mr. Marceca, before requesting background reports on White House Office staff, expended what little time he set aside for the Update Project on every other

office that remained to be completed after Nancy Gemmell retired, As a result of the course and pace he set for himself, he did not begin to work on the White House Office until December 6, 1993, after nearly four months of his six-month detail had already elapsed. See supra at 29; Swails-Brown Decl., Exh. K at 39.

Even then, his approach to the Update Project remained irreconciliable with the notion that he was acting for illicit political purposes, either in concert with or at the direction of anyone else. When he reached the White House Office portion of the June 10, 1993 pass holder list, he started at the top and headed down the list in straight alphabetical order, see supra at 29; Swails-Brown Decl., ¶ 32 & Exh. K at 39-60, just as he had done for employees of the Residence, NSC and GSA. Supra at 28-29; Swails-Brown Decl., ¶¶ 29-31 & Exh. K at 12- 39.

As he worked his way down the list, he prepared requests for previous reports on all the pass holders named, with the exception of the temporary pass holders and new White House employees who were not the concern of the Update Project. See supra at 30-31; Swails-Brown Decl., 33-37. In other words, Mr. Marceca did not limit his requests to high-ranking officials of the Reagan and Bush Administrations. For that

matter, he did not even prioritize his requests according to pass holders' political prominence. He spent the increasingly short time remaining in his detail requesting previous reports on hundreds of individuals of no particular notoriety whatsoever (such as the named plaintiffs in this action) and, as a result, progressed only so far as "Go" in the alphabetical list of White House Office pass holders before his six-month detail ended. See supra at 35; Swails-Brown Decl., ¶¶ 28, 32 & Exh. K at 39-60.

Fifth, at this very time, when it became evident that Mr. Marceca would not complete the Update Project before his detail ended, the White House Counsel's Office (where, according to plaintiffs, Mrs. Clinton had installed her lackeys and "yes men" bent on unlawful access to FBI files, Pl. Mem. at 34) decided that Mr. Marceca's detail would not be renewed. As his six-month detail neared its close, Mr. Livingstone sought to have it extended for an additional period of months. But Mr. Kennedy (one of the aforementioned "yes men," under plaintiffs' theory), ultimately rejected the idea, citing budgetary constraints that surely could and would have been circumvented if necessary to consummate a high-level scheme within the White House to lay hold of FBI background

information on its adversaries. Supra at 34-35; Livingstone Decl., ¶ 31; Kennedy Dep. at 278:7-16, 279:280:1.

Sixth, because Mr. Kennedy would not agree to extend the detail, Mr. Marceca never requested previous reports on White House Office staff with last names beginning "Go" to "Z." See supra at 34-35; Swails-Brown Decl., ¶¶ 28, 32 & Exh. K at 60; Wetzl Decl., ¶ 28. Instead, Mr. Livingstone allowed Lisa Wetzl, who has never been accused of or implicated in any wrongdoing in this matter, to complete that final phase of the Update Project. See supra at 36, Wetzl Decl., ¶¶ 4, 24, 36; Livingstone Decl., ¶ 33. As a result, requests were never made for previous reports on many prominent Republicans whose names appear on the June 10, 1993 list, including:

- C. Boyden Gray, Counsel to President Bush;
- Lynn Martin, Secretary of Labor during the Bush Administration;
- Samuel Skinner, White House Chief of Staff under President Bush, and Chairman of the Republican National Committee;
- John Sununu, also President Bush's White House Chief of Staff;
- Robert Teeter, Chairman of President Bush's 1992 re-election campaign;
- Margaret Tutwiler, Assistant to President Bush for Communications; and

C Clayton Yeutter, Chairman of the Republican National Committee and Counselor to President Bush for Domestic Policy.

Compare Swails-Brown Decl., Exh. G at 33, 36, 38, 42, Exh. H at 19, 31 to id., Exh. K at 61-65 (listing previous report requests made after Mr. Marceca's detail ended on February 18, 1994).

Seventh, before his detail ended, Mr. Marceca made no attempt to conceal the supposedly ill-gotten background reports in a location known only to his supposed co-conspirators.[54/] Nor did he even file them in the OPS system of active files, where, commingled with the files of current White House employees, they might remain inconspicuous. Instead, after informing Ms. Anderson that he had obtained previous reports on persons no longer working at the White House, he segregated them, earmarked them for archival storage, and placed them together in an otherwise empty file bin within the OPS vault. See supra at 31, 33-34; Anderson Dep. at 143:10-22, 146:16-147:4, 271:188-272:1, 273:10-274:2, 276:3-17; 387:13-18. There the architects of this putative conspiracy allowed the files to lay for months where OPS staff

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[54/] To the contrary, he circulated memoranda to GSA, NSC and the Residence which all but advertised the fact that he might have obtained background reports on their employees who no longer worked at the White House. See supra at 31-32; Def. Exh. 23.

members not privy to their scheme could find them, and where one staff member, Lisa Wetzl, in fact discovered them once she took it upon herself to complete the Update Project. See supra at 36-38; Wetzl Decl., ¶ 28.

Eighth, when Ms. Wetzl informed Mr. Livingstone of her discovery that Mr. Marceca had obtained FBI background summary reports on persons no longer working at the White House, see supra at 37-38, his reaction was not that of a co-conspirator worried that his covert operation had been exposed. See Wetzl Decl., ¶¶ 28-29. He made no suggestion that she should treat what Mr. Marceca had done as a secret or keep it from anyone else, id., ¶ 29; see also Livingstone Decl., ¶¶ 34-35, and left the files' disposition to Ms. Wetzl, who, on her own initiative, had them transferred to the Office of Records Management in December 1994. See supra at 39-40; Wetzl Decl., ¶ 33.

Finally, it cannot be overlooked that OPS and its entire staff were located in a diminutive one-room office where, at most if not all times during Mr. Marceca's work on the Update Project, the remaining staff could observe his activities and overhear his conversations, as well as those of Mr. Livingstone. See supra at 7; Anderson Dep. at 33:8-35:4, 36:4-38:8; Wetzl Decl., ¶¶ 5, 8, 21; Livingstone Decl., ¶ 9.

That is hardly the location that co-conspirators wishing to preserve the secrecy of their enterprise would choose as their base of operation. And, in point of fact, neither Ms. Gemmell, Ms. Wetzl, nor Ms. Anderson, who worked day-in and day-out in OPS, ever heard or observed anything to suggest that Mr. Marceca, Mr. Livingstone, or Mr. Nussbaum was involved in any sort of improper scheme to acquire or misuse the FBI background reports of persons who no longer required access to the White House. Gemmell Decl., ¶ 31; Wetzl Decl., ¶¶ 37-38; Anderson Dep. at 43:6-46:1, 53:20-55:5, 55:20-59:8.

D. The FBI Background Reports That OPS Mistakenly Acquired Were Never Used for an Improper Purpose.

In addition to the foregoing facts, plaintiffs' allegations that Messrs. Nussbaum, Livingstone and Marceca obtained plaintiffs' FBI background reports for the illicit political purpose of preparing an "enemies list" on Republican adversaries of the Clinton Administration must also succumb to the fact that the background reports mistakenly acquired by OPS were never used for that purpose, or any other.

Ms. Wetzl's inventory of the files, prepared by Mr. Marceca, that she archived in December 1994, see supra at 39-40; Wetzl Decl., ¶ 34 & Exh. B, shows that (with one exception) all 341 were of former White House Office employees. Swails-Brown Decl., ¶ 38 & Exh. Q. Under

plaintiffs' theory of the case, these were among the group of files most likely to be scoured by the defendants for derogatory personal information. But once again, the facts betray plaintiffs' theories as fiction.

For nearly a year, these files did nothing but gather dust in the OPS vault. During the intervening months between Mr. Marceca's departure and Ms. Wetzl's completion of the Update Project, she and her colleagues had repeated occasion on a daily basis to enter the vault where the files were stored. Yet they saw no evidence that Mr. Marceca's files had at any time been removed from the vault, or otherwise handled. See supra at 36; Wetzl Decl., ¶¶ 11, 24; Anderson Dep. at 146:16-147:16, 153:18-22, 170:15-18, 295:20-296:5.

Once Ms. Wetzl archived the files that Mr. Marceca had mistakenly accumulated, they remained stored in the Office of Records Management (gathering more dust) until June 1996, when they were transferred to the FBI. See supra at 43-44. Because of their sensitive nature, ORM marked them "confidential files," meaning they could be retrieved only by OPS (the office which originated the files) or the White House Counsel's Office. Second Taggart Declaration, ¶¶ 2-3. With the exception of the seven files Ms. Wetzl later determined were of persons still working at the White House, see supra at

41, 44; Wetzl Decl., ¶ 36, 37; Paxton Decl., ¶ 5 & Exh. A, OPS did not remove any of these files from ORM before their June 1996 transfer to the FBI. Wetzl Decl., ¶ 36; Livingstone Decl., ¶ 36.

The Counsel's Office, the only other office in the White House with the authority to request that these files be retrieved from ORM, evidently did not do so either. The Counsel's Office was not even aware of the files' existence before the events in question here came to light, because, until June 1996, OPS never informed the Counsel's Office (or anyone else, for that matter) that it had acquired background reports on persons no longer needing access to the White House. Wetzl Decl., ¶ 37; Anderson Dep. at 269:13-270:13; Livingstone Decl., ¶ 36; Kennedy Dep. at 246:12-24; Nussbaum Decl., ¶ 10.

The documentary record supports these conclusions. Because ORM classified the personnel security files that Ms. Wetzl archived as "confidential," supra at 83, if anyone had asked to retrieve one or more of the files from the boxes where they were stored, then ORM practice would have been to remove the files from the boxes, and to write on the back of the file jackets the name of the requestor, the requestor's office (if necessary), the date, and the box numbers where the

files were located. Second Taggart Decl., ¶ 4.[55] So far as can now be determined, none of the file folders archived by Lisa Wetzl in December 1994 (with the exceptions of those she herself retrieved, supra at 41, 44) indicates that they were removed from ORM at any time before being transferred to the FBI.

When the FBI took custody of these and other files in June 1996, see supra at 44-46, the Bureau, before turning them over to the Office of Independent Counsel, not only made photocopies of the files' contents, supra at 46, but also copied the file folders themselves if they were marked with extraneous stamps or notations of any kind. Cignoli Decl., ¶ 6. Yet, no copies were made of the file folder jackets archived by Ms. Wetzl, indicating that they bore no markings, stamps or notations of any kind, including notations by the Office of Records Management. Compare Wetzl Decl., Exh. B to Cignoli Decl., ¶ 9. The absence of such notations is further evidence that these files were not retrieved from ORM at any time before they were turned over to the FBI in June 1996. See Second Taggart Decl., ¶ 4.

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[55] No similar, permanent record is kept, however, if the file box itself is checked out of ORM.

Likewise, of the additional 71 files the White House transferred to the FBI on June 13, 1996, see supra at 45, 54 of them bore no extraneous markings, stamps or notations of any kind. See Cignoli Decl., ¶ 9.[56/] As for the remaining 17 files, their jackets indicate that they were never removed from ORM until they were checked out on June 13, 1996, by an OPS employee, Edward Hughes, who was assisting the Counsel's Office with the identification and transfer of these files at that time. Id.; Paxton Decl., ¶¶ 12-14.

For these reasons as well, plaintiffs cannot sustain a claim that Messrs. Nussbaum, Livingstone and Marceca acted outside the scope of their employment, that is, with a purpose of gathering derogatory personal information to use against partisan foes of the White House. The files that Mr. Marceca mistakenly acquired simply were not used for that purpose.

II. PLAINTIFFS HAVE NO COMPETENT EVIDENCE THAT MESSRS. NUSSBAUM, LIVINGSTONE AND MARCECA, ACTING OUTSIDE THE SCOPE OF THEIR EMPLOYMENT, OBTAINED OR USED FBI BACKGROUND REPORTS FOR IMPROPER POLITICAL PURPOSES.

To sustain their challenge to the Attorney General's scope-of-employment determination, plaintiffs' burden now is to demonstrate by a preponderence of the admissible evidence

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[56/] Some of these 54 files were never sent to ORM, and had been stored in the OPS vault. See Paxton Decl., ¶ 15 & Exh. F.

that OPS acquired their FBI background reports owing to conduct by the individual defendants that fell outside the scope of their federal employment. See supra at 6; Melo v. Hafer, 13 F.3d at 747. Considering the wealth of evidence to the contrary, that is a heavy burden, indeed, and after two years of discovery, including more than 30 depositions, and thousands of pages of documents produced, plaintiffs have not even begun to shoulder it. They have tendered to this Court absolutely no evidence that Messrs. Nussbaum, Livingstone and Marceca acted with political malice in obtaining their background summary reports.

A. There Is No Direct Evidence That the Individual Defendants Intentionally Obtained Plaintiffs' FBI Background Reports To Uncover Disparaging Personal Information About Partisan Rivals of the White House.

Plaintiffs' brief spans 135 pages, yet they can fill a mere dozen pages when it comes to discussing the actual events giving rise to this litigation -- the acquisition by OPS of FBI background reports on persons no longer needing access to the White House. Pl. Mem. at 41-64. Within these few pages, there appears no testimony of any persons who say they witnessed Bernard Nussbaum, Craig Livingstone or Anthony Marceca say or do anything to suggest that they were engaged in a conspiracy to misuse FBI background information. To the

contrary, the sole percipient witnesses whose testimony plaintiffs cite, Nancy Gemmell and Mari Anderson, both agree (like all other witnesses with first-hand knowledge of these events) that they never heard or observed anything to suggest that Messrs. Nussbaum, Livingstone and Marceca knowingly requested FBI background reports on persons who did not require access to the White House. Plaintiffs ask this Court to infer otherwise based on a disjointed hodgepodge of second-hand and circumstantial "evidence" that is either inadmissible, misguided, or both.

1. Mr. Marceca did not rely on a "master list" indicating which pass holders were active, and which were inactive.

Plaintiffs argue that, when Mr. Marceca took over the Update Project, he must have "deliberately ordered the files of hundreds of individuals identified as 'Inactive'" pass holders because, instead of using the June 10, 1993 pass holder list obtained by Nancy Gemmell, he "obtained a master list of both active and inactive pass holders from the Secret Service . . .." Pl. Mem. at 44-45.[57] As support for this

[57] Plaintiffs repeatedly claim that more than "900 files" were improperly obtained by the White House, see Pl. Mem. at 21, 29, 46, 91, 129, going so far as to state that this number "was revealed" to them during the course of this lawsuit. Id. at 46 n. 24. To the contrary, what was produced to plaintiffs in discovery was an FBI list of previous reports (continued...)

argument, plaintiffs claim that "[Mr.] Marceca testified at a deposition before the House Government Reform and Oversight Committee that the list he requested . . . had 'A' and 'I' designations on it." Id. at 45 (emphasis added). That, in a word, is false. And now that plaintiffs, to advance their position, have so misportrayed Mr. Marceca's testimony, the defendants must set the record straight.

During his June 1996 testimony before the House Government Reform and Oversight Committee, and his deposition by the committee staff, Mr. Marceca explained repeatedly that, when he met with Ms. Gemmell, she showed him a list in the OPS vault to be used for conducting the Update Project, and that, when he later started working on the project, he used the list he found in the vault.[58/] He further testified that the list he found there was the one and only list he used on the Update

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[57/](...continued)
requested by the White House, without distinction as to whether the requests were "improper" or "proper." Pl. Exh. 37. What EOP then revealed to them is that this list included over 400 persons who continued to require access to the White House at the time the White House requested their previous reports. See Responses and Objections to Plaintiffs' Third Set of Interrogatories to [EOP], dated July 16, 1999, Exh. B (filed pursuant to Order of May 7, 1998).

[58/] Marceca House Dep. at 31, 32, 43; Hearing Before the House Government Reform and Oversight Committee on FBI Background Files Obtained by the White House, 104th Cong., 2d Sess. 24, 74, 125, 212 (June 26, 1996) ("House Hrg. (June 26, 1996)") (Def. Exh. 36).

Project; that he did not request another list from the Secret Service; that he did not recall seeing the letters "A" or "I" next to the names on the list;[59] and that the list, as he understood it, was supposed to be of persons requiring access to the White House. Marceca House Dep. at 34, 37, 50, 74; House Hrg. (June 26, 1996) at 26, 41, 81, 124, 215; see id. at 71, 74-75.[60]

This testimony is entirely consonant with the evidence establishing that Mr. Marceca used the June 10, 1993 pass holder list that Ms. Gemmell had left in the OPS vault; the same list that Ms. Wetzl found in the vault with the files that Mr. Marceca had left behind (no "master list" as described by plaintiffs was found there, see Wetzl Decl., Exh. C); a list that does not reflect pass holders' status.

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[59] Thus, when Mr. Marceca testified that he understood "A" to mean "access," and "I" to mean "intern," Pl. Mem. at 45-45; see Marceca House Dep. at 34, evidently he was not referring to a pass holder list, but to uses of those designations he had seen elsewhere. See, e.g., Livingstone Decl., Exh. B at 1 (OPS files on interns designated by letter "I").

[60] He further described the list as having been divided into "sub-groups" such as GSA and NSC, and as including the date and place of birth for each individual. House Hrg. (June 26, 1996) at 25-26. He also remarked that he kept this list in the OPS vault, together with his Update Project files on persons no longer requiring access to the White House, and left it there when his detail ended. Marceca House Dep. at 34, 74.

Supra at 17-18, 22, 24, 35-37. Plaintiffs cannot rely on Mr. Marceca's prior testimony to dispute these facts.

Nor can they rely on the House Report itself. The House Report never purported to identify the list that Mr. Marceca in fact used for the Update Project. Instead, it assumed that "the only way [he] could have obtained all of the names he sought files on would have been by utilizing a master list with both 'Active' and 'Inactive' employees, with the notations 'A' and 'I' clearly indicated on the printout." House Report at 98 (emphasis added). Plaintiffs (who, likewise, never submit or identify the list they claim Mr. Marceca used), ask the Court simply to adopt the assumptions of the House Report, without engaging in fact-finding of its own. Pl. Mem. at 4 & n. 2. The Court should refuse this invitation.

As a threshold matter, the House Report is inadmissible. Reports of government agencies setting forth "factual findings resulting from an investigation made pursuant to authority granted by law" may be introduced as evidence, but not where "the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8)(C); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 (1988). The House Report cannot be deemed trustworthy under Rule 803(8), because

it is a self-described "Interim Report." Observing that its investigation into the FBI files matter "remain[ed] in progress," the committee explained that it had issued the interim report merely "to inform the public as to the status of the investigation," and had "ha[d] yet to determine whether colossal incompetence or a sinister motive precipitated these events." House Report at 1, 3 (emphasis added).[61] Because the report lacked finality, it fails to meet the Rule 803(8)(C) standard of trustworthiness.[62]

Courts also hesitate to admit official reports into evidence under Rule 803(8)(C) where the investigating body has failed to consider evidence that contradicts its findings.[63]

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[61] See also House Report at 16 (finding only "a possibility that the Clinton administration was attempting to prepare a political 'hit list' or 'enemies list' with the background reports that Mr. Marceca obtained").

[62] See In re Korean Air Lines Disaster, 932 F.2d 1475, 1481-82 (D.C. Cir. 1991) (distinguishing admissible final report from inadmissible interim report whose findings were still subject to revision); United Air Lines, Inc. v. Austin Travel Corp., 867 F.2d 737, 743 (2d Cir. 1989) (barring admission of interim report). The report also lacked bipartisan support, House Report at 117-28, raising further questions about its reliability. See Pearce v. E.F. Hutton Group, 653 F. Supp. 810, 815 (D.D.C. 1987) (refusing to admit subcommittee report "that was hotly disputed and dissented to directly along lines of political affiliation").

[63] See Gentile v. County of Suffolk, 129 F.R.D. 435, 453-54 (E.D.N.Y. 1990); McFarlane v. Ben-Menashe, No. 93-1304, 1995 WL 129073, *5 (D.D.C. Mar. 16, 1995), opinion partially

(continued...)

That is the case here. Whether or not the House Report should be considered admissible at all, the committee's assumptions as to which pass holder list Mr. Marceca used fail to account for the subsequent discovery of the June 10, 1993 list, and therefore have no remaining probative value.

As the basis for supposing that Mr. Marceca used a Secret Service "master list" of active and inactive employees, the House Report, at 98, cites an analysis that the Secret Service conducted "to determine if, in fact, [it] had provided any list which would have inaccurately reflected any or all of [the inactive pass holders whose background reports Mr. Marceca acquired] as active passholders in 1993 or 1994."[64/] (Plaintiffs also rely on the Secret Service analysis. Pl. Mem. at 45-46.)

In testimony before the House committee, the Secret Service noted that any list Mr. Marceca had actually used for purposes of the Update Project was not then available for its examination. House Hrg. (July 17, 1996) at 16. (At the time,

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[63/](...continued)
withdrawn on other grounds, 1995 WL 799503 (D.D.C. Jun. 13, 1995), aff'd, 91 F.3d 1501 (D.C. Cir. 1996).

[64/] Hearing Before the House Government Reform and Oversight Committee on FBI Background Files Obtained by the White House, 104th Cong., 2d Sess. (July 17, 1996) ("House Hrg. (July 17, 1996)") at 14 (Def. Exh. 37) (emphasis added); see id. at 16.

the only copy of the June 10, 1993 list remained in the possession of OIC. See supra at 46.) The Secret Service based its inquiry, therefore, on a review of other routine pass holder lists. Its analysis revealed that, of over four hundred individuals who were among the persons whose previous reports Mr. Marceca requested, almost all were listed as inactive in the Secret Service's pass holder database.[65] The Secret Service concluded, therefore, that "its system did not create a list which would inaccurately reflect the inactive former employees as active." House Hrg. (July 17, 1996) at 16, 39-40 (emphasis added); Libonati House Dep. at 11; Undercoffer House Dep. at 6.[66]

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[65] House Hrg. (July 17, 1996) at 15, 19-20, 125; Deposition of John Libonati dated July 10, 1996 ("Libonati House Dep.") at 6-11 (Def. Exh. 38); Deposition of Jeffrey Undercoffer dated July 10, 1996 ("Undercoffer House Dep.") at 5-7, 10 (Pl. Exh. 36).

[66] More precisely, the Secret Service concluded that almost all of these pass holders would not have appeared on an active-only pass holder list in 1993, and that they would have been properly designated as inactive on any "master list" of active and inactive pass holders provided to OPS at the time in question. The "master list" of active and inactive pass holders included a "status" column where each pass holder on the list was designated as either "A" for active or "I" for inactive. The active pass holder list contained the names of active pass holders only. House Hrg. (July 17, 1996) at 15, 26, 30-31, 39-40; Libonati House Dep. at 8-9; Undercoffer House Dep. at 32.

The Secret Service analysis was not intended, however, to determine what kind of list Mr. Marceca had actually used in conducting the Update Project. Indeed, during the committee's hearings, the Secret Service declined even to speculate as to whether Mr. Marceca used a master list of active and inactive pass holders when he was working on the Update Project. House Hrg. (July 17, 1996) at 37-38. That assumption is the House Report's alone, and has now been rendered completely untenable by the subsequent discovery of the June 10, 1993 list.

OIC released the June 10, 1993 pass holder list on September 24, 1996, just four days before the House Report was published. See supra at 46. The conclusions reached in the House Report do not take the June 10, 1993 list into account. See House Report at 96-98. But the June 10, 1993 list shows that the House Report focused on the wrong question. Based on the Secret Service's earlier analysis, on which the House Report relies, it was not possible for the Secret Service to produce a list that "inaccurately reflected" the status of inactive pass holders as active. But the June 10, 1993 list demonstrates that the Secret Service could have produced -- and did, in fact, produce -- a customized pass holder list of

active and inactive pass holders that did not reflect their pass holder status at all.[67]

The Secret Service has confirmed its ability to produce such a customized pass holder on not just one but two occasions. The Secret Service first made this clear in a letter to the ranking minority member of the House committee, written shortly after the release of the June 10, 1993 list. Letter from William Pickle to the Hon. Cardiss Collins, dated September 27, 1996, at 2 (Def. Exh. 39 at 4). The Secret Service's analysis for this case also indicates that the June 10, 1993 list is a Secret Service list of both active and inactive pass holders, but that does not indicate their status. See supra at 17-18; Moffat Decl., ¶¶ 14-18.

Thus, the House Report made assumptions about the "only list" Mr. Marceca "could have used" in the absence of a critical document -- the list he actually used -- whose subsequent discovery has rendered irrelevant the Secret Service analysis on which those assumptions are based. As a result, plaintiffs are without probative evidence on the pivotal question of what list Mr. Marceca relied on to conduct the Update Project. The undisputed evidence shows that he

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[67] The question whether the Secret Service could have produced such a customized list was not posed to the Secret Service during the House hearings on this matter.

used the June 10, 1993 list, a list that does not indicate the pass holder status of the persons named on it.

2. The OPS staff was unaware that Mr. Marceca had obtained previous reports on persons who never worked for the Clinton White House.

Plaintiffs next attempt to draw inferences from two pieces of Mari Anderson's Senate testimony, the first being her recollection that, during Mr. Marceca's work on the Update Project, the OPS staff became aware that he had obtained previous reports on persons "who no longer needed access to the White House." Pl. Mem. at 47-48. But plaintiffs overlook the fact that, at the time, OPS did not know these were persons who had never worked for the Clinton White House. See supra at 31-32, 38, 43. That is undisputed. Ms. Anderson testified both during her Senate deposition, and in this case, that at the time the OPS staff thought these were persons, like Ms. Gemmell, who remained at the White House following the change of administration, but who had departed by the fall of 1993.[68/] As a result, OPS viewed the situation no differently than other, not altogether out-of-the-ordinary circumstances, unrelated to the Update Project, where

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[68/] Anderson Sen. Dep. at 156:3-157:12; Anderson Dep. at 134:7-136:11, 137:12-17, 139:15-142:14, 158:10-14, 270:14-271:13, 343:5-11. See also Livingstone Decl., ¶ 34.

background information requested from the FBI did not arrive until after the individuals in question had departed.[69]

It is also undisputed, and important to recognize, that neither Mr. Marceca nor anyone else in OPS knew before the fact that he was requesting previous reports on persons who did not need access to the White House. Mr. Marceca discovered that he had done so only after obtaining previous reports on GSA, NSC and Residence employees, then circulating memoranda to these offices, asking that their holdovers needing five-year re-investigations complete new SF-86s, and then learning from these offices that some of these employees had departed. Supra at 31-32; Anderson Sen. Dep. at 84:21-91:10; Def. Exh. 23. Thus, the situation Ms. Anderson described at her Senate deposition had nothing to do with deliberately requesting background reports on persons who it was known in advance did not work at the White House.[70]

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[69] Supra at 33; Anderson Sen. Dep. at 108:2-109:22; Anderson Dep. at 143:10-22, 146:16-147:4, 271:18-272:1, 273:10-14, 276:3-17, 387:13-18; Livingstone Decl., ¶ 34.

[70] Indeed, amidst her description of these events Ms. Anderson testified that she never witnessed anything that would lead her to believe that Mr. Marceca ordered previous reports from the FBI for any reason other than to complete the Update Project, Anderson Sen. Dep. at 115:8-116:5, 169:3-13, 173:19-23, and she repeated that sentiment during her deposition in this case. Anderson Dep. at 43:6-46:1, 53:20-59:6, 60:2-62:19.

It is also important to remember that Mr. Marceca alerted his colleagues to the fact that he had obtained previous reports on persons no longer needing White House access, and consulted, at least with Ms. Anderson, as to what might subsequently be done to avoid ordering background reports on persons not working at the complex. See supra at 31, 33; Anderson Dep. at 138:4-139:14, 272:10-14. In the final analysis, this episode is not evidence of a partisan political conspiracy, but the absence of one.

Plaintiffs rely next on Ms. Anderson's recollection that, at some point in 1993, she picked up a pass holder list from the Secret Service, and noticed immediately that it included such names as James Baker, and Marlin Fitzwater. Anderson Sen. Dep. at 149:11; see also id. at 99:16-21. She testified that the staff, including Mr. Marceca, crossed the names of the Bush political appointees they could recognize off the list (and then asked the Secret Service to remove them from the roster of active pass holders). Id. at 100:2-15, 149:11-150:11. Plaintiffs suggest that Mr. Marceca used this list for the Update Project, despite its recognized flaws. Pl. Mem. at 50-51. This was not the case, for at least three reasons.

First, at her deposition in this case, Ms. Anderson identified the list she may have been referring to as an August 1, 1993 list of active White House Office pass holders. Anderson Dep. at 127:9-129:11 & Exh. 4.[71] If, as she recalled in her Senate testimony, OPS struck names from the list as soon as she picked it up, then this episode would have taken place more than two weeks prior to the date when Mr. Marceca began his OPS detail, on August 18, 1993. Ms. Anderson acknowledged, therefore, that she may have been mistaken in her initial recollection that Mr. Marceca participated in striking names from this list. Id. at 130:11-134:7.[72]

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[71] The government has filed the August 1, 1993 list together with Ms. Anderson's May 7, 1998 deposition. Def. Exh. 4. The list was familiar to her because of her recollection, during her Senate deposition, that she had marked names off the list with a black marker she called a "sharpie" pen. Anderson Sen. Dep. at 100:5-8, 150:9-11. She recognized those same type of markings on the August 1, 1993 list. Anderson Dep. at 127:20-129:1 & Exh. 4 at, e.g., 1-2, 5-7.

[72] To the extent there is any conflict in her testimony, plaintiffs argue that Ms. Anderson's October 1996 Senate testimony should be taken as more reliable than her deposition in this case, because it was closer in time to (although still some three years following) the events in question. Pl. Mem. at 51. Plaintiffs overlook the fact, however, that during her Senate deposition she did not have the opportunity (as she did in this case) to review the August 1, 1993 list in order to refresh her recollection, particularly as to the timing of these events.

Second, whether or not Mr. Marceca helped cross out names from the August 1, 1993 list, under no circumstances could that list (rather than the June 10, 1993 list) have been the one that Mr. Marceca used to conduct the Update Project. It does not include the critical pass holder information -- social security number, and date and place of birth -- that the FBI required in order to process requests for previous reports. See supra at 15-16; Gemmell Decl., ¶ 17 & Exh. A; see Wetzl Decl., ¶ 30; Anderson Dep. at 96:16-97:4. It is, moreover, a list of White House Office employees only,[73/] and therefore could not have been used to request previous reports on NSC, Residence, and GSA employees, as Mr. Marceca in fact did.

Third, it could not even have been the list of White House Office staff that Mr. Marceca used. In contrast to the June 10, 1993 list, the August 1, 1993 list does not contain the names of hundreds of White House Office employees whose previous reports Mr. Marceca requested, compare Anderson Dep., Exh. 4 to Swails-Brown Decl., Exh. O, -- including plaintiffs Cara Alexander, Marjorie Bridgman, Joseph Cate, and Joseph Duggan. See Anderson Dep., Exh. 4 at 1, 3, 4, 6.

[73/] Printed on the first page of the list, above the first pass holder's name, is the heading "White House Operations Personnel." Anderson Dep., Exh. 4 at 1.

In short, when Ms. Anderson testified about crossing off former White House staff from a pass holder list, it was not the June 10, 1993 list that Mr. Marceca used for the Update Project. The August 1, 1993 list she most likely was talking about could not possibly have been used for purposes of the Update Project. Therefore, her Senate testimony cannot support an inference that Mr. Marceca deliberately ordered the previous reports of individuals who he knew no longer worked at the White House.

3. Plaintiffs offer no further proof of contemporaneous events in OPS that supports their claims.

Plaintiffs have nothing further to say about what actually happened in OPS in 1993, except to make several miscellaneous insinuations that are at best unproven, and are most accurately described as untrue. First, it stands to reason, say plaintiffs, that Mr. Marceca knew he was acting improperly when he ordered background reports on such well-known Bush Administration officials as Marlin Fitzwater and James Baker. Pl. Mem. at 50.[74] But the long-overlooked fact

[74] Of course, plaintiffs have no answer to the question why, if a relatively small number of prominent figures such as James Baker and Marlin Fitzwater were the targets of the Update Project, did OPS bother to obtain background reports on hundreds of ordinary White House employees, while ignoring the background reports of such prominent Republicans as John

(continued...)

is that OPS neither requested nor obtained Marlin Fitzwater's background report.[75] As for Mr. Baker's report, it was quite common at the time in OPS (as it was elsewhere in the White House, due to staff shortages) to rely on interns to perform routine office tasks. Gemmell Decl., ¶ 15; Anderson Dep. at 92:22-93:3; Livingstone Decl., ¶¶ 24, 26; see Nussbaum Dep. at 391:19-392:6. It is not difficult to imagine that Mr. Marceca assigned the chore of typing request forms to an intern, someone lacking his alleged "political aware[ness]." Pl. Mem. at 49. Mari Anderson testified, in fact, that requests for previous reports, including Mr. Baker's, may have been prepared by an intern. Anderson Dep. at 264:19-268:15.[76]

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[74](...continued)
Sununu, Robert Teeter and Clayton Yeutter. See supra at 78-79.

[75] A request form was prepared for Mr. Fitzwater's previous report. Def. Exh. 13 at FBI 003433. However, as indicated by the lack of FBI receipt or return stamps on the form, it was never sent. See Carner Decl., ¶ 3. Instead, it was placed in an otherwise empty file folder with Mr. Fitzwater's name on it, which Lisa Wetzl archived in December 1994 together with other files Mr. Marceca had prepared. See Wetzl Decl., ¶ 33 & Exh. B at 6; Def. Exh. 40 at FBI B1060-62 (filed under seal). Neither FBI records nor the OPS ledger indicates that Mr. Fitzwater's previous report was disseminated to the Clinton White House. See Swails-Brown Decl., ¶ 39 & Exh. J at 29.

[76] Mr. Marceca has testified that he was provided the assistance of an intern for approximately one month, in December 1993, who typed request forms for the Update Project.
(continued...)

Second, based on the assumption that Craig Livingstone personally reviewed all previous reports obtained during the Update Project, plaintiffs conclude that he, too, must have reviewed James Baker's previous report, and that he also reviewed the background report received in January 1994 on Billy Dale, whom he knew had been fired from the Travel Office in May 1993. It stands to reason, the argument goes, that Mr. Livingstone also knew that OPS had improperly obtained these and other background reports. Pl. Mem. at 48-50.

However, Mr. Livingstone did not review background reports obtained during the course of the Update Project. Rather, he directed Mr. Marceca to review them, and to bring them to his attention only when they raised questions about individuals' suitability for employment at the White House. Livingstone Decl., ¶ 30. This occurred rarely, and, as a result, Mr. Livingstone does not recall reviewing any background reports that Mr. Marceca received, and certainly not the background reports of anyone he did not believe required access to the White House. Id., ¶¶ 30, 43. Plaintiffs construe Ms. Anderson's Senate testimony to the

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[76]/(...continued)
Marceca House Dep. at 40, 58. OPS requested James Baker's previous report on December 6, 1993. Swails-Brown Decl., Exh K. at 41.

contrary, but overlook her consistent recollection, during both of her depositions, that Mr. Marceca reviewed the background reports that he obtained. Anderson Dep. at 321:9-12; Anderson Sen. Dep. at 112:23-113:4, 113:23-114:3.

Plaintiffs next allude to a March 1993 memorandum that Mr. Livingstone wrote to Mr. Kennedy, wherein he stated

> Once the initial rush subsides we will begin to request copies of files from the FBI on carryovers. This will be our first glance at the background information of their employees.

Def. Exh. 41 at 2; see Pl. Mem. at 43. Plaintiffs purport to understand "their employees" as a reference to obtaining FBI background reports on former White House employees. The Court should reject this argument because (i) it is contrary to the explicit text of the memorandum, which refers to "carryovers," not to former employees, (ii) the passage in question appears under the heading "III. 86/BI Files on Carryovers," Def. Exh. 41 at 2 (emphasis added), (iii) Mr. Livingstone testified under oath before the Senate Judiciary Committee that the memorandum means exactly what it says, Hearing of the Senate Judiciary Committee on FBI Files, 104th Cong., 2d Sess. 10 (Sept. 25, 1996) ("Sen. Hrg.") (Def. Exh. 42), and (iv) Senator Orrin Hatch agreed that "[t]he memo clearly suggested that [OPS] hoped to use the FBI files to learn more about carryovers," in remarks that immediately follow Mr.

Livingstone's testimony, but which plaintiffs fail to submit to the Court. Id. at 11 (emphasis added); see Pl. Exh. 35.

Finally, plaintiffs conflate two wholly separate and distinct procedures when they allege that OPS suspiciously deviated from prior procedure by temporarily discontinuing the practice of sending "copies of requests for FBI background investigations sought by OPS" to FBI Special Agent Dennis Sculimbrene. Pl. Mem. at 21-22. When Agent Sculimbrene states that he would receive copies of requests "for FBI background investigations," Declaration of M. Dennis Sculimbrene, dated August 9, 1999 ("Sculimbrene Decl."), ¶ 8 (Pl. Exh. 19), he can only be referring to requests to initiate investigations on new employees (or, perhaps, for five-year re-investigations). Requests for previous reports on existing employees, the type of request made for the separate purpose of the Update Project, did not require that the FBI conduct new investigations, merely that it provide the White House copies of summary reports of the subjects' prior background investigations.[77]

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[77] Agent Sculimbrene's meaning becomes particularly clear in light of the fact his job was to "perform[ ] background checks on White House personnel." Id., ¶ 1. It would have made sense to provide him with copies of requests for the background investigations he was to perform. But he served no investigatory function related to the Update Project (continued...)

Plaintiffs' "supporting" documentation (an instruction sheet captioned "SF-86 Process," an obvious reference to the required completion of a form SF-86 before a background investigation may begin), only fortifies this conclusion. Pl. Exh. 20. Most revealing are the instructions under the heading "Phase III," which direct the reader to "[s]tamp full field request original and copy with the date," "[m]ark at bottom the initials D.S." (meaning, as the handwritten marginalia suggest, "Dennis Sculimbrene, FBI"), and "send [third copy] to Dennis in blue folder." Id. (emphasis added). This document speaks to a process by which Agent Sculimbrene was sent copies of requests for the background investigations that he was stationed at the White House to perform, and sheds no light on the intentions of the completely separate undertaking known as the Update Project.

B. There Is No Direct Evidence That Messrs. Nussbaum, Livingstone or Marceca Ever Misused Information in Plaintiffs' FBI Background Reports.

Plaintiffs do not and cannot name a single former employee of the Reagan or Bush Administrations -- not one -- whose reputation has been "smeared or destroyed" using information from an FBI background report. They do not

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[77]/(...continued)
that would have required sending him copies of requests for previous reports.

identify a single piece of derogatory FBI background information that has been improperly disclosed to the media, or anyone else. Given the array of first-hand testimony by knowledgeable witnesses, and the undisputed documentary record, that no such misuse of FBI background reports obtained by OPS ever occurred, supra at 82-85, it comes as no surprise that plaintiffs' allegations to the contrary are left floating in a complete evidentiary vacuum.

Nevertheless, plaintiffs claim to have "compelling" evidence that the White House "misused" FBI summary reports that were obtained in the course of the Update Project. Pl. Mem. at 54-64. However, this "evidence" consists almost entirely of the deposition testimony of Linda Tripp, testimony which, by Ms. Tripp's own account, is in every material respect incompetent hearsay, assumption and speculation. See Visser v. Packer Engineering Assoc., 924 F.2d 655, 659 (7th Cir. 1991) (witnesses' testimony must be grounded in personal knowledge, not "flights of fancy, speculations, hunches, intuition or rumors"). Each and every time that plaintiffs deposed a knowledgeable witness in the hope of substantiating Ms. Tripp's assertions, they came away empty-handed. Indeed, her testimony is rebutted by the testimony of multiple

witnesses, as well as the documentary evidence, rendering it incredible as well as inadmissible.

1. Plaintiffs have no competent evidence that William Kennedy kept "hip-high stacks of Republican FBI files" lying around his office.

To support their allegation that FBI files were "misused," plaintiffs rely most heavily on Linda Tripp's testimony that Associate White House Counsel William Kennedy kept "stacks and stacks" of files in his office. Pl. Mem. at 55-59; Deposition of Linda R. Tripp, dated Dec. 14, 1998; Jan. 5, 13, 22, 1999, ("Tripp Dep.") at 167-69, 173-74 (Def. Exh. 43). However, there exists not a shred of competent evidence to support the allegation that Mr. Kennedy had stacks of former White House employees' FBI files in his office. As a threshold matter, Ms. Tripp's improbable description of multiple stacks of files piled "hip high" all over the floor of Mr. Kennedy's office is contradicted by each of the six other more knowledgeable witnesses to testify on the subject. But whether or not the picture painted by Ms. Tripp is accurate, her testimony that these files may have been "FBI files" is, by her own admission, incompetent hearsay and speculation.

In addition to oversight of OPS, and suitability determinations of persons working at the White House, Mr.

Kennedy was also responsible for the process of "vetting" persons under consideration for Presidential appointments. Kennedy Dep. at 67-69, 89-90, 268; Nussbaum Dep. at 106-07. In each case, that process began when the White House Office of Presidential Personnel ("OPP") circulated memoranda (usually once or twice a week) identifying candidates under consideration for particular appointments. Deposition of Stephen Waudby dated March 10, 1999 ("Waudby Dep.") at 46-48, 50, 53-54 (Def. Exh. 44). These included candidates for Cabinet positions, as well as for lesser offices such as membership on various boards and commissions. Kennedy Dep. at 89-90, 95-98, 268; Waudby Dep. at 47-48.

In connection with the vetting (or "clearance") process, Mr. Kennedy kept two files on each person under consideration for political appointment by the Clinton Administration. Waudby Dep. at 47:5-49:7, 50:1-51:2, 53:5-54:7; see Kennedy Dep. at 89-90, 123-26. First were "vetting files," containing financial disclosure forms, IRS tax checks, and other non-FBI related information. Waudby Dep. at 51-52. Vetting files were stored in cabinets located in Mr. Kennedy's office suite, in the space, immediately outside his personal office, occupied by his support staff. Id. at 51, 55-57 & Exh. 1. Counsel Office "vetters" reviewed these files to ensure that

all paperwork was in order and that the nominations could go forward. Id. at 47, 52.

Mr. Kennedy also kept a separate set of files containing FBI background summary reports on each candidate. See Kennedy Dep. at 98-99. These files were stored separately from the vetting files, in four combination-locked safes located in Mr. Kennedy's personal office. Waudby Dep. at 52:9-53:2, 59:2-60:4, 63:20-65:1, 68:20-69:6 & Exh. 1; see also Kennedy Dep. at 128-29, 135. Mr. Kennedy personally reviewed the contents of these files, after which they were returned to the safes. Waudby Dep. at 63:20-64:5. The safes were kept locked at all times except to retrieve or return files stored there. Id. at 68:20-69:16; see also Kennedy Dep. at 128-29, 131.

Once a candidate completed the vetting process, Mr. Kennedy's staff prepared a form memorandum advising OPP that the nominee had been cleared by the Counsel's Office. Waudby Dep. at 66-67. A copy of that memorandum, together with any press release announcing the appointment, was placed in the nominee's file folder located in one of Mr. Kennedy's safes. Id. at 74-75.

In short, Mr. Kennedy supervised an operation where handling files was the essence of the daily routine. Ms. Tripp acknowledged that she had no day-to-day involvement with

that routine, Tripp Dep. at 533-34, 543, and that she only had occasion to be in Mr. Kennedy's office approximately ten times during the entire course of her Counsel Office employment (from April 1993 to May 1994). Id. at 187, 376, 393-94, 401-02. She testified that on more than one of these occasions she saw stacks and stacks of files, "hip-high," in Mr. Kennedy's office, piled on the tables and on the floor. Id. at 182-83. Six different witnesses, however, with far more routine access to Mr. Kennedy's office, and greater familiarity with the vetting process conducted there, have repudiated Ms. Tripp's account.

Stephen Waudby, for example, was a GSA employee detailed to the White House from January 1994 to February 1995, and worked as Mr. Kennedy's administrative assistant until Mr. Kennedy departed the White House in November 1994. He worked in the same office suite as Mr. Kennedy, and had occasion to be in Mr. Kennedy's office at least twice a day over the course of nearly a year. Waudby Dep. at 12-16, 19-21. He explained unequivocally, based on his day-in, day-out experience, that Mr. Kennedy did not have files stacked hip-high around the floor of his office:

> There were never files stacked, hundreds of files stacked anywhere in his office, whether it be on the floor or on the table or window sills or anywhere.

Id. at 16:1-6; see id. at 81:20-90:5. "There were not piles of files or documents of any type on the floor in [Mr. Kennedy's] office." Id. at 84-85 (emphasis added).

Mr. Kennedy himself, who would be most familiar with how he kept his office, similarly testified that he did not keep hundreds of files stacked everywhere in his office. At most, he might have had files he was reviewing on a given day stacked on his work table, in piles that would have reached no more than a foot or so if he was extremely busy. Kennedy Dep. at 132-33. All of the files that Mr. Kennedy kept in his office were related to the vetting process. Id. at 272-73.

Others who worked for or with Mr. Kennedy, including those who had occasion to be in his office on a daily basis, confirm that he never kept "hip-high" stacks of files. Deborah Gorham, for example, worked as an assistant to Mr. Kennedy for six weeks in late 1993, and occupied a desk in the support staff area immediately outside his office. Deposition of Deborah Gorham dated June 3, 1999 ("Gorham Dep.") at 353, 381-82 (Def. Exh. 45). She testified that, to the extent she noticed any files in Mr. Kennedy's office, she "only saw stacks on his desk. Whether they were files or paper, I have no idea." Id. at 358. Ms. Gorham did not remember these

stacks being extraordinarily high, nor did she remember any stacks on the floor. Id. at 479-80.

Following Ms. Gorham's departure, Betsy Pond worked for Mr. Kennedy from February 1994 until he left the White House in November 1994. Deposition of Betsy Pond, dated May 27, 1999 ("Pond Dep.") at 219-20, 366 (Def. Exh. 46). She also sat at a desk immediately outside Mr. Kennedy's office, and was in his personal office two or three times a day. Id. at 250. She testified that at any given time there could have been one to four stacks of files in Mr. Kennedy's office, no more than an inch or so high. Id. at 255, 388. Whatever stacks there may have been were kept on Mr. Kennedy's tables, and she never saw stacks of files on the floor. Id. at 254-55. At no time did Ms. Pond see anything that could be described as "stacks and stacks" of files, hip-high, in Mr. Kennedy's office. Id. at 388-89.

The Counsel to the President, Bernard Nussbaum, also had reason to be in Bill Kennedy's office "a fair amount." Nussbaum Dep. at 438. He confirmed that, when he was there, he never saw files stacked up hip-high. Id. at 437-39. Finally, Craig Livingstone, who worked under Mr. Kennedy's supervision and who therefore was in his office on a daily basis, also attests that he never saw "stacks and stacks" of

files in Mr. Kennedy's office. Livingstone Decl., ¶¶ 40-41. In short, each witness to testify on the subject, all of whom had far greater access to and familiarity with Mr. Kennedy's office than Ms. Tripp, contradicts her testimony regarding the appearance of Mr. Kennedy's office and the quantity and location of files maintained there.

Whether or not there is any truth to Ms. Tripp's improbable account of "hip-high stacks of files" lying all over the floor of Mr. Kennedy's office, in the final analysis there is no competent evidence that Mr. Kennedy kept "FBI files" on former White House employees, or anyone else (including "Republicans") not under consideration for Presidential appointments. The testimony of Ms. Tripp that plaintiffs once again attempt to rely on, Pl. Mem. at 54-58, is admitted hearsay and speculation that is uncorroborated by any of the admissible evidence.

Ms. Tripp admitted that she had no first-hand knowledge of what the alleged "stacks" of files were, emphatically stating that "I have no idea if the stacks and stacks of files that I presumed to be FBI files were, in fact, FBI files." Tripp Dep. at 477-78 (emphasis added); see id. at 140 ("to this date, I don't know what I saw"). She merely assumed these files were FBI files, because they looked similar to

files she believed Betsy Pond had identified as FBI files. Id. at 83, 140, 181, 235-36, 581-82. Thus, her testimony rests on a foundation of hearsay and assumption, not personal knowledge, and is inadmissible.[78]

Ms. Tripp's testimony plunges further into the depths of speculation in light of her statements that she had no significant exposure to the vetting process that Mr. Kennedy oversaw. Tripp Dep. at 533-34, 543; see also id. at 508, 544-45 ("[i]f [Mr. Kennedy] and his staff were vetting SES folks or, you know, the Assistant Secretary level . . . I would not have been exposed to that information"). By her own admission, therefore, Ms. Tripp has no first-hand knowledge of whether the files she saw -- regardless of the quantity -- were FBI files, or simply vetting files with which she was simply unfamiliar.[79]

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[78] Fed. R. Evid. 602, 802; see U.S. Burnett, 890 F.2d 1233, 1241 (D.C. Cir. 1989); Morris v. Washington Metro. Area Transit Auth., 702 F.2d 1037, 1046 n. 21 (D.C. Cir. 1983) (employee witness may not testifyg to details of other employees' conduct); Smith v. Pena, 1998 WL 164774, * 16 (hearsay inadmissible to support challenge to scope-of-employment certification).

[79] Plaintiffs cite Ms. Tripp's account of a conversation with Mr. Kennedy in which he "intimate[d]" that the files in his office were not vetting files. Pl. Mem. at 55-56. However, on cross-examination Ms. Tripp stressed that the conversation did not seem important to her at the time: "[I]t's very important that I not overstate or read in all

(continued...)

There is no testimony from any witness in a position to know that confirms Ms. Tripp's assumption that what she saw were FBI files. Mr. Waudby testified that Mr. Kennedy did not leave files containing these sensitive documents piled up around his office, either on the floor, or anywhere else. Except for the background reports he reviewed at his desk on any given day, no more than about twenty-five in number (each consisting of 3-4 pages), Mr. Kennedy kept these files stored and locked at all times in the safes. Waudby Dep. at 64:1-65:1, 68:20-69:17, 85:21-87:3. And, far from allowing the handful of files he reviewed at any time to linger on his desk for months on end, Mr. Kennedy required Mr. Waudby to re-file them in the safes each evening before leaving the office, a task that Mr. Waudby carried out faithfully, lest Mr. Kennedy "knock [his] head clean off." Id. at 84-90.

Mr. Kennedy also testified that FBI summary reports were kept locked in the four combination safes in his office:

> [O]ther than what was in the safes, it would be rare for me have more than five or 10 files. . . . I mean, it was not my practice to keep large amounts

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[79]/(...continued)
these years later to a conversation that I didn't really at the time think was all that critical." Tripp Dep. at 540-41. She also admitted that her understanding was based on no more than a "hand movement," and could be wrong: "Maybe I misunderstood. I'm just telling you what I got from the conversation." Id. at 535, 543.

> of files from the clearance process in my office. I tried to move them in and out in an orderly fashion as they were needed to either be there or not be there. But it was a voluminous job. I dealt with many, many people in the clearance process. And there were times, I'm sure, there were 20 files in my office.

Kennedy Dep. at 139, see also id. at 128-29, 131, 135; Livingstone Decl., ¶ 41.

For her part, Betsy Pond never handled an FBI file, never saw an FBI file, in fact, had no knowledge whatsoever of FBI files, and had no idea what kind of files were kept in Mr. Kennedy's office. Hence, she was "100 percent certain" that she never told Linda Tripp, or anyone else, that files in Mr. Kennedy's office were "FBI files." See generally Pond Dep. at 245-51, 334-39, 386-87; see also Waudby Dep. at 104-09.[80/]

Ms. Tripp also assumed that various files she saw were "FBI files" because of their undefined "commonality" with the

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[80/] Ms. Pond's testimony makes perfect sense, because it was not her job to handle FBI materials. Waudby Dep. at 91-97. As Mr. Waudby explained, Ms. Pond "didn't have access to those at all . . .. Mr. Kennedy made sure that there was limited access and he made it known to me that I was to be responsible for those files." Id. at 92 (emphasis added). Instead, she assisted Mr. Waudby with the vetting files. Id. at 91-92. Thus, on occasion she might have had vetting files (which were red or yellow, depending on the type of appointee, see Waudby Dep. at 54-55) situated on her desk in order to set them up, prepare labels, or type form letters to OPP stating that a person had been cleared for nomination. Id. at 97; see Pond Dep. at 222, 228-37, 245-46 (testifying that she worked with red and yellow file folders).

files Ms. Pond supposedly told her were FBI files. See, e.g., Tripp Dep. at 32-33, 93-94. But that testimony actually detracts from the credibility of her entire story.[81] In fact, these various files were dissimilar in appearance. FBI summary reports on White House Office staff (such as Ann Brock, William Canary, and others whose FBI files Ms. Tripp claimed to have seen), were maintained in orange personnel security folders. Livingstone Decl., ¶ 14 & Exh. B. On the other hand, FBI background reports that Mr. Kennedy kept in his office for purposes of the clearance process were kept in blue or green folders (again, depending on the type of nominee). Waudby Dep. at 65. Thus, had Ms. Tripp truly seen personnel security folders containing FBI background reports, and had she truly seen files of FBI summary reports that Mr. Kennedy maintained, she should have recalled that these files bore no "commonality" to each other.

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[81] For one thing, Ms. Tripp was unable to describe any of the files that supposedly shared this "commonality." See, e.g., Tripp Dep. at 42-43, 47, 414-16, 428-30, 572. Moreover, although she testified that the alleged FBI files did not look like personnel or vetting files, she could not describe the appearance of those files, either. Id. at 433-35, 437-40, 524. Ms. Tripp was able to remember, however, that she "never saw an FBI folder or any folder that was emblazoned with the seal of the FBI or the Department of Justice in any way." Id. at 40.

Finally, plaintiffs claim to find proof of file "misuse" where Ms. Tripp, reading from an FBI printout of previous report requests, purports to identify persons whose files she may have seen in Mr. Kennedy's office. Pl. Mem. at 54-55. But in this regard as well, Ms. Tripp's testimony remained an exercise in speculation. She herself was "hesitant to give . . . names," because she was "not sure if [she was] remembering from the list," which she first saw re-printed in the newspaper in 1998, "or from seeing [the files] in person" in 1993 or 1994. Tripp Dep. at 174 (emphasis added).

Ms. Tripp's reluctance was well-founded, because there are no witnesses with actual knowledge of the facts who will support her. Mr. Kennedy himself testified that he only had the FBI background reports of persons who were properly in the clearance process for Presidential appointees. Kennedy Dep. at 179, 215-16, 268-69.[82/] Mr. Kennedy's testimony is buttressed by Mr. Waudby, who was intimately familiar with the vetting process and the files kept in and around Mr. Kennedy's

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[82/] Lacking any competent evidence to the contrary, plaintiffs assert that Mr. Kennedy was "literally choking" during his deposition when he denied improperly maintaining files on "Republicans" in his office. Pl. Mem. at 56. The government welcomes the Court's review of the videotape of this oft-cited non-event. Pl. Exh. 40. The tape plainly shows that Mr. Kennedy was attempting to suppress his reaction to what he clearly viewed as a preposterous notion.

office.[83] Mr. Waudby never saw files in Mr. Kennedy's office of any persons outside the clearance process, including Bush or Reagan Administration employees, or other prominent Republicans. Id. at 76:22-78:14.

Ms. Tripp's impressions and beliefs also lack for substantiation in the documentary evidence. For example, she testified to seeing a file on Representative William Clinger. Tripp Dep. at 173, 237-38, 572-73. Yet the FBI has no background investigation file on Congressman Clinger, and no record that EOP ever requested, or that the FBI ever provided, such a file. See Pl. Exh. 56 at 23. Similarly, Ms. Tripp testified that she might have seen files in Mr. Kennedy's office on former Bush Administration employees Ann Brock and William Canary. Tripp Dep. at 216, 218. Yet these were among the files, obtained by Mr. Marceca, that everyone in OPS has testified remained in the OPS vault until December 1994 (at

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[83] As Mr. Kennedy's assistant, Mr. Waudby was responsible for the creation, maintenance and organization of the vetting files, and so developed familiarity with the names of the persons in the clearance process for whom files had been established. Waudby Dep. at 58:17-19, 71:5-73:1. He was also responsible for the maintenance and organization of the files in which Mr. Kennedy stored FBI background reports, including routine reviews of these files to make sure they contained all necessary paperwork. Mr. Waudby generally recognized these as files on the same Clinton Administration appointees whose vetting files he was also responsible for maintaining. Id. at 73:2-76:21.

which time Lisa Wetzl archived them), well after Ms. Tripp's August 1994 departure from the White House, Wetzl Decl., ¶¶ 33-34 & Exh. B at 2-3; Tripp Dep. at 29-30; see supra at 82-85.

Ms. Tripp also testified that she might have seen a file for holdover White House employee Al Nagy. Tripp Dep. at 235-37. However, Mr. Nagy's previous report was not delivered to the White House until June 13, 1994, see Swails Brown Decl., Exh. K at 61. Ms. Tripp testified that she has no memory of being in Mr. Kennedy's personal office after May 1994, when she ceased working for the Counsel's Office. Tripp Dep. at 570-71.

2. Plaintiffs have no competent evidence that the White House loaded FBI background information into a computer database.

Still reaching into the dry well of Ms. Tripp's impressions and beliefs, plaintiffs next cite as evidence of file "misuse" her assertion that Betsy Pond entered data into her office computer from files on her desk. Pl. Mem. at 58-61. But Ms. Tripp's testimony that these may have been FBI files is based exclusively on her subjective interpretation of a conversation she allegedly had with Ms. Pond, and her recollection that the files shared the same "commonality" with other files that Ms. Pond supposedly told her earlier were FBI

files. Tripp Dep. at 86-90, 92, 94-96, 589-94. This, of course, is a mélange of assumption and hearsay, unsupported (and, indeed, refuted) by the first-hand testimony.

Ms. Tripp admitted that Betsy Pond neither "said she was inputting data from the FBI files into her computer," nor identified what sort of information she was typing. Tripp Dep. p. 86, 89-90, 109-110, 591, 593. She called her own testimony about Ms. Pond's "role" a "leap in assumption." Id., p. 110. On the other hand, the undisputed first-hand testimony is that Ms. Pond never worked with, or even saw, files containing FBI background information, and so she never could have described any files to Linda Tripp as FBI files. Supra at 114. Accordingly, she also rejected the allegation that she entered FBI background information into a computer with "100 percent certain[ty]." Pond Dep. at 336-37.[84/]

Rather, Ms. Pond explained that she only used her computer to type letters, Pond Dep. at 242-43; see id. at 284-85, 393-94, and that while she relied on information from files to prepare these letters, the files in question were the red and yellow vetting files that did not contain FBI

[84/] Ms. Gorham similarly failed to substantiate Ms. Tripp's speculation that she, too, was entering FBI data into computers during the six weeks she worked for Mr. Kennedy. See Tripp Dep. at 110-11; Gorham Dep. at 481-82, see also id. at 207, 385.

background information. Id. at 242-46. She referred to these files simply for the correct spelling of candidates' names, and their social security numbers. Id. at 284-85.[85]

This testimony is confirmed by Mr. Waudby, who explained that Betsy Pond never entered information from any FBI background reports into a database, nor did she ever keep them on her desk where they might have been seen by Ms. Tripp. That was the case because Ms. Pond was never permitted to handle these documents, and the office computers housed no databases of any kind. Waudby Dep. at 92:8-93:11, 95:19-97:4, 98:4-100:12.[86] Thus, the only testimony of witnesses with personal knowledge of the work that Ms. Pond performed is to the exclusive effect that she did not enter FBI background information into a computer database.

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[85] See also Waudby Dep. at 97:6-98:3 (it was routine for Ms. Pond to have candidates' vetting files on her desk to perform a variety of tasks, including the preparation of memoranda to the Office of Presidential Personnel advising that candidates had successfully completed the clearance process).

[86] Ms. Pond's desk was clearly visible to Mr. Waudby both from his own desk, which was only four feet from hers, as well as other locations in the 10-foot by 20-foot office space that they shared. Mr. Waudby personally reviewed the contents of the office computers to "clear up space" on the hard drives. Waudby Dep. at 93:14-95:13, 99:20-100:12.

Of course, even if Ms. Pond had entered FBI background information into a computer (which she did not), that fact alone could hardly be taken as evidence of "misuse." Plaintiffs therefore attempt to cast this alleged activity in a sinister light by tying it to yet another strand of Ms. Tripp's hearsay testimony, her recollection that she overheard bits and pieces of a conversations between Mr. Kennedy and Marsha Scott about loading data into a computer to share with the Democratic National Committee. Pl. Mem. at 59-60.

Plaintiffs' reasoning is plainly untenable given the definitive, first-hand testimony that Ms. Pond did not enter information from FBI files into a computer, and the lack of competent evidence that Mr. Kennedy and Ms. Scott were discussing FBI files.[87] Whatever Ms. Scott and Mr. Kennedy may have been discussing, the competent evidence is undisputed that no FBI background information was typed into a computer. See also Pl. Exh. 56 at 30 (EOP interrogatory answers confirming that it has no knowledge of FBI background

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[87] Plaintiffs editorialize when they refer to the subject of this discussion as data "from FBI files." Pl. Mem. at 59. Ms. Tripp stated only that she heard the word "files," and assumed that because Mr. Kennedy was carrying files sharing the same "commonality" with other files that she believed were FBI files, the conversation must have involved FBI files. Tripp Dep. at 142, 145, 163.

information being transferred to the Democratic National Committee).

Having exhausted Ms. Tripp's supply of inadmissible hearsay and speculation, plaintiffs next rely on hearsay and speculation of their counsel: the declaration of a Judicial Watch employee who apparently interviewed Leslie Gail Kennedy, William Kennedy's ex-wife. According to their counsel's testimony (which plaintiffs misleadingly attribute to Ms. Kennedy herself), she recalls occasions when Mr. Kennedy worked with "'stacks' of FBI files in their home," and made entries from them into a computer. Pl. Mem. at 62, citing Declaration of Christopher J. Farrell, dated June 29, 1999 ("Farrell Decl."), ¶ 2 (Pl. Exh. 41).

This testimony is inadmissible hearsay, and largely irrelevant. Plaintiffs' counsel asked Ms. Kennedy whether her ex-husband was entering data from the FBI files of former Reagan and Bush Administration personnel not under consideration for presidential appointments by the Clinton Administration. Farrell Decl., ¶ 3. And if she had answered yes, they surely would have reported that fact -- but she did not. Instead, even as reported second-hand by plaintiffs' counsel, she merely responded that she knew of no reason why Mr. Kennedy would type information about Democratic nominees

into his computer. Id. That kind of cryptic response does nothing to support the allegation that Mr. Kennedy misused "FBI files" on persons who were not under consideration for political appointments by the Clinton Administration.

3. No "FBI files" were transferred from Vince Foster's office to the Executive Residence.

Plaintiffs also attempt to establish "misuse" of FBI information via their utterly unsupported speculation that, in the wake of Vince Foster's suicide, FBI files were spirited away from his office to the Executive Residence, allegedly by Craig Livingstone. Pl. Mem. at 63-64. This conjecture — which even plaintiffs characterize as merely "likely" — is foreclosed by the direct record evidence.

Linda Tripp's testimony supposedly "placing FBI files in [Mr.] Foster's office and safe" is anything but "uncontroverted." Pl. Mem. at 64. It is, in the first place, inadmissible. Ms. Tripp testified to seeing a file labeled "Dale" in and around Vince Foster's Office in May 1993, about the time of the Travel Office firings. But, when specifically asked whether the file she saw came from the FBI, Ms. Tripp herself stressed that she could only remember seeing a "file" with the name "Dale" on it, and "to this day" could not identify it as an FBI file. Tripp Dep. at 48; see also id. at

46 ("I don't know that it was Billy Dale's file . . . with any degree of certainty. I can tell you that was my assumption").[88] By her own admission, then, Ms. Tripp was testifying based on inadmissible speculation.

The admissible documentary and testimonial evidence not only fails to substantiate Ms. Tripp's testimony, it also strips her testimony of all credibility. The documentary evidence -- which plaintiffs do not dispute -- establishes that OPS requested Billy Dale's FBI previous report in December 1993, some seven months after he was fired from the Travel Office, and that the FBI provided the report to the White House on January 6, 1994. See supra at 30; Swails-Brown Decl., Exh. K at 50. Ms. Tripp could not have seen an FBI file on Mr. Dale in May 1993, or any other time prior to Mr. Foster's suicide on July 20, 1993, see Tripp Dep. at 447-48, 459-60, 469-71, when Mr. Dale's previous report did not arrive at the White House until January 1994.[89]

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[88] Ms. Tripp also acknowledged that her belief that the "Dale" file was an FBI file was not based on first-hand knowledge of her own, but on having been told by Betsy Pond (allegedly) that other files "similar" to that file were FBI files. Tripp Dep. at 46-47. As discussed supra, at 112-115, Ms. Pond neither told Linda Tripp, nor could have told her, any such thing.

[89] Indeed, even Ms. Tripp allowed that, if the documentary evidence is correct that Mr. Dale's summary report

(continued...)

Furthermore, Ms. Tripp testified that she observed the "Dale" file on three occasions: (i) as William Kennedy carried it into Mr. Foster's office for a meeting she says Deborah Gorham, then Mr. Foster's secretary, explained to her was a meeting about the Travel Office; (ii) when she accompanied Ms. Gorham into Vince Foster's office to look at some photographs, and noticed the "Dale" file on his desk; and (iii) when Ms. Gorham opened the safe in Mr. Nussbaum's office for her, and the two of them observed a file inside labeled "Dale." Tripp Dep. at 36-37, 40-42, 62-64, 66-67.

Ms. Gorham fails to support any of these assertions: (i) she never knew of the "Travel Office" meeting Ms. Tripp testified about, and so not could have identified such a meeting to Ms. Tripp; (ii) she is "certain" she "never walked into Vince's office with Linda Tripp;" and (iii) "[u]nequivocally," she "never opened that safe in [Ms. Tripp's] presence," because it was her understanding that only she and Betsy Pond could open the safe or retrieve documents from it, "[s]o I was not comfortable in anyone else being

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[89]/(...continued)
was acquired many months subsequent to his firing (as now plaintiffs admit that it is, Pl. Mem. at 82), it would change her belief that the file she saw labeled "Dale," and other files that looked like that file, were FBI files. Tripp Dep. at 458-59.

around." Gorham Dep. at 252-55, 258-59, 262, 293-94, 297, 298-99, 305, 307-09, 478, 482-86; see also Pond Dep. at 286-90.[90/] In short, Ms. Tripp's testimony is neither admissible, nor credible, and thus lends no support to the notion that Mr. Dale's FBI file was ever in Vince Foster's office, let alone that it was later removed to the Residence.

Indeed, the only competent evidence on point confirms that no FBI background data was removed from Mr. Foster's office following his death. Mr. Nussbaum, for example, testified that he reviewed "every file" in Mr. Foster's office, and that the only files sent to the Residence concerned the Clintons' blind trust. Nussbaum Dep. at 406-09. See also Pl. Exh. 56 at 31-32.

Plaintiffs also ignore undisputed evidence when they persist in speculating about Craig Livingstone's "unexplained access" to the Residence. Pl. Mem. at 63. In response to plaintiffs' inquiries about Secret Service "WAVES" logs showing that Mr. Livingstone twice entered the Residence

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[90/] Ms. Gorham not only denied ever seeing a file labeled "Dale" on Mr. Foster's desk, Gorham Dep. at 260-61, 285, 310, but Ms. Gorham, who Linda Tripp admits was "completely familiar" with the contents of the safe in Mr. Nussbaum's office, Tripp Dep. at 66-67, testified that she never saw an envelope in the safe labeled "Dale." Gorham Dep. at 290-92; see also Pond Dep., pp. 391-92; Nussbaum Dep. at 261-62, 411.

during his White House employment, EOP has fully explained and documented that he entered once to attend the 1993 Congressional Holiday Ball, together with 750 other guests, and once to attend the 1994 Tennessee Day Reception, with 380 other guests. Pl. Exh. 56 at 19-20; Def. Exh. 47. On no occasion did Mr. Livingstone ever transport information from FBI files to the Executive Residence, a fact he confirmed during his recent deposition. Id.; Livingstone Dep. at 95:12-96:15, 461:4-13. Thus, no matter how "likely" plaintiffs view the proposition to be, there is simply no evidence that FBI information was transported from the Counsel's Office to the Residence, by Craig Livingstone, or anyone else.

4. The alleged "gap" in the OPS log does not support plaintiffs' claims of file "misuse."

Finally, plaintiffs point to allegedly missing pages from the OPS log as further evidence that FBI background information was misused. Pl. Mem. at 63. Plaintiffs are simply incorrect.[91/] The testimony is unanimous and unequivocal that the log was used only to keep track of personnel security files checked out on new Clinton

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[91/] For one thing, it has never been established that pages are in fact missing from the log. That was Ms. Anderson's guess during her Senate deposition, but she has consistently acknowledged that she has no personal knowledge of that being the case. Anderson Sen. Dep. at 66:4-7; Anderson Dep. at 154:1-155:22.

Administration employees, and that the files of former employees, or even holdovers, were never checked out of OPS. Anderson Sen. Dep. at 49, 50; Anderson Dep. at 166:14-22, 170:14-18; Wetzl Decl. ¶ 11.

From time to time, Craig Livingstone hand-delivered individuals' FBI summary reports to the Counsel's Office. But it is undisputed that in each case these were current Clinton Administration employees with unresolved background issues, not persons whose previous reports had been obtained connection with the Update Project. Livingstone Decl. ¶¶ 38, 43; Anderson Sen. Dep. at 52, 120; Anderson Dep. at 166:14-22, 168:13-170:18; see supra at 36 n. 20. Nothing in the record supports plaintiffs' speculation that supposedly missing pages from the OPS log had anything to do with misuses of their background reports.

C. Plaintiffs Cannot Carry Their Burden of Proof Simply by Relying on Mr. Marceca's Invocation of His Fifth Amendment Privilege.

During his deposition, Mr. Marceca -- the only named target of an investigation by Independent Counsel Kenneth W. Starr, see Def. Exh. 48 -- invoked his Fifth Amendment privilege against self-incrimination. He did so broadly, refusing even to acknowledge that he had ever been employed at the White House, or that he knew the persons there with whom

he worked. Deposition of Anthony Marceca dated June 9, 1999, at 84:10-16, 88:21-89:5, 97:21-98:16, 169:9-14, 378:5-9 (Def. Exh. 49). He refused to answer questions no matter how outlandish or lacking in foundation, such as whether his wife and children helped provide FBI background information to the First Lady, and whether Vince Foster was murdered to keep him from revealing what he knew about misuses of FBI files. Id. at 149:21-155:14, 163:21-164:13, 169:21-170:16, 171:13-172:5, 270:13-272:14. See also id. at 105:19-106:19, 108:12-109:13, 192:17-199:20, 265:11-268:6, 304:1-4, 355:13-356:6. Plaintiffs ask this Court to draw "strong if not definitive adverse factual inferences" from Mr. Marceca's invocation of the Fifth Amendment that he and others gathered, reviewed and released FBI background information for political ends. Pl. Mem. at 65, 67-68, 123-124. Such inferences are unwarranted here.

"Before an adverse inference may be drawn from a party's refusal to testify in a civil case, there must be independent corroborative evidence to support the negative inference beyond the invocation of the privilege." Kontos v. Kontos, 968 F. Supp. 400, 408 (S.D. Ind. 1997) (collecting cases). The rationale for this is clear: although "[s]ilence is a relevant factor to be considered in light of proffered

evidence, . . . the direct inference of guilt from silence is forbidden." Kontos, 968 F. Supp. at 409 (quoting LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 390 (7th Cir. 1995)).

In this case, plaintiffs cite no potentially corroborating evidence. They have not a single witness to testify that Mr. Marceca or anyone else obtained FBI background information as part of a pre-meditated scheme to embarrass or intimidate political opponents of the Clinton Administration. Instead, they rely on a few nuggets of circumstantial evidence that all crumble under the weight of the broad array of first-hand testimony and documentary evidence that this entire incident came about because Mr. Marceca unwittingly relied on the June 10, 1993 pass holder list to conduct the Update Project.

On the question of file "misuse," plaintiffs cite no newspaper articles or other accounts making any FBI background information public, rendering it virtually impossible for them to show that such information was leaked to the press, or anyone else, as part of some scheme to deliberately misuse it. Plaintiffs rely instead upon the deposition testimony of Ms. Tripp, but in all essential respects her testimony is inadmissible assumption and hearsay that no witness with personal knowledge has substantiated. The government, on the

other hand, has adduced the testimony of knowledgeable witnesses, together with documentary evidence, demonstrating that plaintiffs' FBI background reports were never "misused" in any sense. Where any evidence plaintiffs might have that the individual defendants acted outside the scope of their employment is so outweighed by the government's evidence to the contrary, they cannot rely on Mr. Marceca's broad assertions of his Fifth Amendment privilege to tip the scales in their favor.

D. Plaintiffs' Theories About Other Alleged "Misuses" of Government Files Are Inadmissible.

Perhaps because plaintiffs have no evidence that the individual defendants committed the acts alleged in the complaint, they seek to rely on a host of alleged acts that are unrelated to their claims, see Pl. Mem. at 71-94, evidence which is not admissible here.

As a threshold matter, to the extent evidence of extrinsic acts is offered merely to prove "the character of a person in order to show action in conformity therewith," it is inadmissible under Federal Rule of Evidence 404(b). Huddleston v. United States, 485 U.S. 681, 685 (1988). No extrinsic acts can be proven, for example, to show that defendants harbored some sort of "Filegate mentality" that

rendered them likely to commit the acts alleged in the complaint. Pl. Mem. at 10-17.[92] Accordingly, as proof of character, the evidence that plaintiffs proffer is inadmissible.

Even if the evidence of extrinsic acts upon which plaintiffs rely was construed as being offered for some purpose other than to show character -- such as to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," Fed. R. Evid. 404(b) -- it would still be inadmissible. Extrinsic acts are irrelevant -- and thus inadmissible -- unless the proponent can demonstrate that they are sufficiently similar to the acts alleged in their complaint.[93]

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[92] Moreover, by way of demonstrating the "Filegate mentality," plaintiffs merely recycle the tales told and allegations raised in various books, newspaper articles, and other sources of hearsay that are inadmissible to prove anything, let alone the defendants' character. See Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605, 618 (1974) (newspaper articles are unreliable and inadmissible hearsay); U.S. v. Microsoft Corp., 56 F.3d 1448, 1462-63 (D.C. Cir. 1995) (improper to rely on hearsay material in a book).

[93] See, e.g., Jankins v. TDC Management Corp., 21 F.3d 436, 441 (D.C. Cir. 1994) (extrinsic acts must be "closely related" to the acts at the heart of the litigation); United States v. DeLoach, 654 F.2d 763, 768 (D.C. Cir 1980), cert. denied, 450 U.S. 933 (1981); United States v. Foskey, 636 F.2d 517, 524 (D.C. Cir. 1980) ("when a prior [bad] act is relied upon to prove intent or knowledge, similarity between the two

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Under Rule 404(b), "similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Huddleston v. United States, 485 U.S. 681, 689 (1988) (emphasis added).[94] Thus, for example, plaintiffs' attempt to introduce evidence of the release of information from the personnel files of State Department employees -- extrinsic evidence that is, in plaintiffs' view, "reminiscent" of the allegations of their complaint -- must be rejected. Pl. Mem. at 89-91. There is no evidence, or even the allegation, that Mr. Nussbaum, Mr. Livingstone or Mr. Marceca had anything to do with this event. Indeed, the report of the State Department Office of Inspector General, which plaintiffs cite,[95] expressly states that "[n]o evidence was found or developed" that "anyone in the White

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[93](...continued)
events must be shown to establish the threshold requirement of relevance").

[94] See id. (Rule 404(b) does not allow a party to "parade . . . a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo); see also U.S. v. Cardall, 885 F.2d 656, 671 (10th Cir. 1989) (evidence of other bad acts allegedly committed by associates of the defendant involved in the same business is not admissible).

[95] The newspaper articles that plaintiffs also cite regarding this incident are inadmissible hearsay. Educational Equality League, 415 U.S. at 618; Microsoft, 56 F.3d at 1462-63.

House directed or knew in advance of the records retrieval, knew of the content of the files before [Washington Post reporter Al] Kamen's disclosures, or were involved in the unauthorized dissemination of Department privacy-protected information." Pl. Exh. 62 at iv (emphasis added).[96]

Where the extrinsic events are too remote in time from the events at issue, they are also inadmissible to prove a party's state of mind.[97] For example, plaintiffs invoke alleged episodes that cannot be admitted for the reason that they occurred approximately a full decade before the allegations of the complaint arose.[98] Finally, where alleged

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[96] Likewise, plaintiffs seek to introduce an undated, unsourced, one-page document making an allegation not against Messrs. Nussbaum, Livingstone and Marceca, but against the U.S. Army. See Pl. Mem. at 91-92. The document states that "[t]he Army sought to discredit [an individual being considered for a Presidential appointment] by providing his U.S. Army Security Clearance dossier through Mr. Marceca to White House personnel." Pl. Exh. 64 (emphasis added). It is therefore not admissible under Rule 404(b).

[97] United States v. Watson, 894 F.2d 1345, 1349 (D.C. Cir. 1990) ("[t]he temporal (as well as the logical) relationship between a defendant's later act and his earlier state of mind attenuates the relevance of such proof"). See also United States v. Latney, 108 F.3d 1446, 1450 (D.C. Cir.) ("the more distant the time between two events the less likely the events are connected"), cert. denied, 118 S.Ct. 355 (1997).

[98] See, e.g., Pl. Mem. at 11 (asserting that in 1984, defendants Livingstone and Marceca investigated "peccadilloes and vulnerabilities" of political opponents during Senator

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extrinsic acts are unsupported by the evidence, they are inadmissible under Fed. R. Evid. 403 and 404. See Huddleston, 485 U.S. at 689 & n. 6. For example, plaintiffs' tired theories about the "Ellen Rometsch strategy," see Pl. Mem. at 72-73, are inadmissible because, more than a year ago, the Court found no evidence that George Stephanopoulos's televised remarks about "Ellen Rometsch" had anything to do with either the White House, or misuses of FBI files.[99] That remains the case today, thus barring consideration of plaintiffs' "Ellen Rometsch" theory.

In sum, the extrinsic acts that plaintiffs invoke are unsupported by the evidence or not even similar to the alleged acts of the complaint and are thus inadmissible. Four of the alleged extrinsic acts that plaintiffs cite are discussed in detail below.

1. The Defense Department's release of information from Linda Tripp's security clearance form.

As circumstantial evidence of Messrs. Nussbaum's, Livingstone's and Marceca's state of mind in 1993, plaintiffs

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[98](...continued)
Gary Hart's presidential campaign).

[99] Memorandum Opinion dated May 28, 1998, at 61; see also Deposition of George Stephanopoulos, dated March 9, 1998 ("Stephanopoulos Dep."), at 273-74, 282, 284 (excerpts at Def. Exh. 55); Pl. Exh. 56 at 30.

first seek to introduce evidence about the Defense Department's release of information from Linda Tripp's security clearance form to a reporter for The New Yorker magazine.[100] This evidence cannot be admitted to prove these individuals' intent or plan, first, because it involves an event taking place in 1998, almost five years after the activities alleged in the complaint. After so long a passage of time, no link can be inferred between these two episodes.[101] But this evidence should also not be admitted for the separate and independent reason that plaintiffs have not proven, nor have they even alleged, that the individuals for whom substitution has been sought had any involvement with the decision to release information from Ms. Tripp's security clearance form. Huddleston, 485 U.S. at 689.

Plaintiffs cannot forge the necessary link merely by positing that somebody in the White House was involved with

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[100] The discussion of this matter is based upon the deposition testimony and documents produced in discovery only, not the investigatory files of the Defense Department's Office of Inspector General, and Office of General Counsel, that pertain to the release of information from Ms. Tripp's security clearance form (files that this Court has reviewed in camera).

[101] Jankins, 21 F.3d at 441 (when "the events occur many years after the conduct in dispute, we cannot find the conditions of admissibility under Rule 404(b) satisfied"); see Watson, 894 F.2d at 1349 (later acts are most likely to show the accused's intent when they are fairly recent).

the release. The relevance requirement under Rule 404(b) cannot be met by introducing evidence of the bad acts of a party's co-workers for the same enterprise. Cardall, 885 F.2d at 671. In any event, plaintiffs have not produced any evidence in support of their contention that anyone at the White House, let alone Messrs. Nussbaum, Livingstone, and Marceca, was involved in the Defense Department's release of information from Linda Tripp's security clearance form to the New Yorker magazine, or that there was any "high-level cover-up" afterwards. Pl. Mem. at 74-79.

Clifford Bernath testified that he had no contact with anyone at the White House regarding the release of information about Ms. Tripp, and knew of no one at the Defense Department who had, including Secretary Cohen.[102] Kenneth Bacon also testified that he had not "discussed Linda Tripp with anyone at the White House," and was unaware of any conversation between Secretary Cohen and the White House about the issue. Deposition of Kenneth Bacon, dated May 15, 1998 and May 24,

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[102] See Deposition of Clifford Bernath, dated April 30, 1998; June 10, 1999 ("Bernath Dep.") at 123:7-10; 123:19-125:5 (Def. Exh. 50); 342-43 (denying that he released Tripp information in order to please the President); see also id. at 537-38, 540-41.

1999 ("Bacon Dep.") at 46:11-21, 533 (Def. Exh. 51); see id. at 278:5-7, 401, 508:11-15; 570:12-13.[103]

Plaintiffs allege that Mr. Bernath was acting "under the direct orders" of Mr. Bacon, "a Clinton Administration political appointee." Pl. Mem. at 75. Mr. Bacon and Mr. Bernath testified to the contrary. The two discussed Ms. Mayer's request and mutually agreed that Mr. Bernath would handle it. Bacon Dep. 216:10-17, 217:3-6; Bernath Dep. at 245:3-8, 621:3-11. Mr. Bacon made clear that he "did not instruct [Mr.] Bernath to get the [Tripp] information and release it," Bacon Dep. at 117:14; see id. at 465:17-18,

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[103] Mr. Bacon acknowledged that on March 13, 1998, he might have told the White House, as part of his "normal operating procedure," that "Cohen was going to be on the Wolf Blitzer show on Sunday, . . . what we thought the topics would be, and . . . that he was prepared for a Tripp question. I would have done that because I typically do that before the Secretary appears on a Sunday television show, inform the White House that it's happening and what he think[s] he'll discuss." Bacon Dep. at 508-15. However, Mr. Bacon could not recall whether he actually had such a conversation. See Bacon Dep. at 511:11-12.

Messrs. Bacon and Bernath further stated that they never discussed releasing Ms. Tripp's information with Michael McCurry. Bacon Dep. at 278:1-4; Bernath Dep. at 121:19-20. Mr. McCurry's recollection of then-Deputy White House Press Secretary Joe Lockhart telling him that he (Mr. Lockhart) referred Ms. Mayer to the Defense Department -- a fact upon which plaintiffs appear to rely, Pl. Mem. at 78-79 -- is not to the contrary. The fact that it was Ms. Mayer who approached the White House, and that the White House deflected her inquiries, hardly demonstrates that the White House played a "a key role" in the release. Id. at 79.

494:8-10, nor did Mr. Bernath consider Mr. Bacon's request that he give Ms. Mayer the information she had asked for to be an "order." Bernath Dep. at 232-33.[104]

Both witnesses denied the allegation that a career employee such as Mr. Bernath, rather than a political employee such as Mr. Bacon, was chosen to release the information to Ms. Mayer so as to insulate the Clinton Administration from any negative fallout. Bacon Dep. at 353:18-22; Bernath Dep. at 287-88; see also id. at 245, 586, 588-89. In spite of this testimony, plaintiffs insist that Secretary Cohen's televised remark that Mr. Bernath had responded to Ms. Mayer's press inquiry was "obviously an attempt to make Bernath, a 'career employee' not tied politically to the Clinton Administration, the 'fall guy' for the unlawful release." Pl. Mem. at 76.

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[104] Plaintiffs cite notes of a Department of Defense employee which show, at most, that their author may have believed that Mr. Bernath had said that he needed the Tripp information for a meeting with Secretary Cohen. Pl. Mem. at 77. However, Mr. Bernath testified in his deposition that he had never had such a meeting with the Secretary. See, e.g., Bernath Dep. at 613-19. Likewise, when plaintiffs asked Mr. Bernath about another handwritten comment on another document stating that he had said that he had such a meeting, Mr. Bernath again reiterated that he never had a meeting with the Secretary of Defense about the Tripp release, "[s]o I disagree with that characterization that I ever said that." Id. at 530:14-19, 531:14-15; see also Bacon Dep. at 606:12-17 (Bacon unaware of "any instance" where Secretary Cohen, his office, or someone acting on his behalf "requested information quickly about the Tripp matter").

Again, Mr. Bacon testified to the contrary. He explained that, at the time, Secretary Cohen did not even know of Mr. Bacon's involvement in the release of the Tripp information. Bacon Dep. at 592:10-17; see id. at 349:5-11, 367:15-22, 616-17. Mr. Bacon squarely denied that "the reason [that he was not surprised that Secretary Cohen did not mention him on the program] is because you and Secretary Cohen had decided that you were going to blame a career employee rather than a political appointee[.]" Id. at 353:6-11; see id. at 353:18-354:1.[105]

Plaintiffs' reliance on the Department of Defense's letters to Congressmen John Mica and B.H. Solomon is likewise unavailing. See Pl. Mem. at 78. In response to questions about why a draft of the letter to Congressman Solomon did not identify Messrs. Bacon or Bernath as the individuals responsible for the release, Mr. Bernath testified that

> it had nothing to do with who we wanted to identify. We wanted to provide an initial answer to let the congressman know that the matter was being looked into . . . so it wasn't a matter of whose name we wanted to include or not include. . . . Solomon wanted to know what was being done. I told him

[105] The Secretary's subsequent decision not to correct his remark publicly is hardly evidence of a continuing cover up. Mr. Bacon testified that he advised Secretary Cohen to respond to press inquires by stating that "we should allow the IG investigation to be complete before commenting on what happened." Bacon Dep. at 449:15-18.

there was an investigation that was being conducted, and that was enough of an answer.

Bernath Dep. at 444:14-20, 445:5-8. Likewise, after making clear that he was not involved in drafting a response to Congressman Mica, Mr. Bernath testified that he did not ever think that a "cover-up was underway." Id. at 551:15-17. As this Court has already found, the draft responses to Congressman Mica "do[] not by any means prove a political cover-up of potential political motivations behind or connections to the Tripp release." Alexander v. FBI, 186 F.R.D. 154, 165 (D.D.C. 1999). Despite additional discovery, plaintiffs have added nothing meaningful to this evidence, and thus cannot prove any White House involvement with the Tripp release or any sort of cover-up.[106]

This Court explained over a year ago that the initial link in any chain of inference that could tie the Defense Department's release of information about Linda Tripp to the activities of Messrs. Nussbaum, Livingstone and Marceca in

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[106] Another point that plaintiffs raise is equally wide of the mark. Plaintiffs imply in a rhetorical question that Ms. Mayer learned about Ms. Tripp's arrest record from the White House. Pl. Mem. at 79. Yet Ms. J. Lowe Davis, Ms. Tripp's ex-stepmother, testified that she was the one who told Ms. Mayer about Ms. Tripp's arrest. Deposition of J. Lowe Davis, dated June 26, 1998, at 87-88 (Excerpts at Def. Exh. 52). For a refutation of plaintiffs' allegation that Mr. Bernath was "paid off," see infra at 162.

1993 would have to be proof that the release occurred "at the direction of the White House." Memorandum and Order dated April 13, 1998, at 6. Plaintiffs have failed to demonstrate any such link, rendering evidence of this extrinsic act inadmissible under Rule 404(b). Huddleston, 485 U.S. at 689.

2. The release of Kathleen Willey's letters.

Plaintiffs also seek to rely upon evidence about the release of Kathleen Willey's letters, but this episode also took place four to five years after the matters alleged in the complaint, and there is nothing in plaintiffs' entire discussion of this event that even alleges that Messrs. Nussbaum, Livingstone, or Marceca participated in the decision to release any of this information. Pl. Mem. at 79-82.[107] Thus, the release of Ms. Willey's letters -- an act committed by others, years after Messrs. Nussbaum, Livingstone and Marceca left the White House -- can say nothing about them or about any possible plan or scheme they are alleged to have had, and are inadmissible. Huddleston, 485 U.S. at 689;

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[107] Plaintiffs have been able to draw only one slim connection between any of the individual defendants and this episode: they state that Mrs. Clinton "agreed" with the decision to release Ms. Willey's letters. Pl. Mem. at 82. That is hardly enough to support plaintiffs' theory that she was somehow "directly involved" in that decision, Pl. Mem. at 82, or, more to the point, had any involvement in the acquisition or misuse of plaintiffs' FBI background files. Cardall, 885 F.2d at 671.

Jankins, 21 F.3d at 441; Watson, 894 F.2d at 1349; Cardall, 885 F.2d at 671.

Moreover, any connection between the complaint's core allegations -- that the defendants obtained FBI background information on former White House employees for political ends -- and the release of letters written by Ms. Willey herself is far too tenuous for the two to be considered "similar" acts. Those letters were released to defend the Office of the President in the unique context of possible impeachment. The release of correspondence from Ms. Willey to the President in preparation for extraordinary impeachment proceedings can shed no light on how Messrs. Livingstone and Marceca would have treated information of a far different kind, that is to say, confidential FBI background information, in a far different context.

At best, the release of the Willey letters may be similar to the acts alleged in the complaint only in that it is an episode of alleged misuse of information by officials at the White House. But if plaintiffs must reach for such a broad level of generality to connect extrinsic act evidence to the core of their complaint, the evidence should not be admitted. As the D.C. Circuit has made clear, "when one must, in order to find similarity, define the character of the acts at such a

high level of generality as here . . ., and many of the events occur years after the conduct in dispute, [a court] cannot find the conditions of admissibility under Rule 404(b) satisfied." Jankins, 21 F.3d at 441.

3. Alleged misuse of Billy Dale's FBI file.

Despite more than thirty depositions and thousands of documents produced in discovery, plaintiffs have not introduced any competent evidence that several of the extrinsic acts they seek to rely on actually occurred. Plaintiffs' failure to support their extrinsic act allegations, particularly in the face of the government's counter-evidence demonstrating that the alleged "misuses" did not occur, renders the evidence inadmissible. See Huddleston, 485 U.S. at 689 n.6; Clarke, 24 F.3d at 263.

For example, plaintiffs contend that the White House "misused" Billy Dale's background report to engineer the firing of the Travel Office, and that this episode should be considered as circumstantial evidence that the individual defendants likewise misused the plaintiffs' FBI background reports. Pl. Mem. at 85. But the competent evidence of record belies plaintiffs' allegation that Billy Dale's FBI file was misused.

Mr. Dale's FBI background summary report was obtained in January 1994 (in connection with the Update Project), was stored in the OPS vault, and, subsequently, was transferred to the Office of Records Management, where it remained until produced to investigators in May and June 1996. See supra at 82-85; Swails-Brown Decl., Exh. K at 50; Wetzl Decl., ¶ 33-35 & Exh. B, Sherburne Sen. Dep. at 105-07, 141-42; Def. Exh. 31 at FBI 000295. See also Pl. Exh. 56 at 25-26. As even plaintiffs acknowledge, the White House did not even request Billy Dale's previous report until December 1993. Pl. Mem. at 82, citing Pl. Exh. 37. Yet, as plaintiffs also observe, Mr. Dale and his Travel Office colleagues were fired in May 1993, seven months earlier. Id. at 83, citing Declaration of Billy Ray Dale, dated August 6, 1999 ¶ 3 (Pl. Exh. 38). Thus, by their own reckoning, plaintiffs' "verifiable 'straight line' of improper misuse of Mr. Dale's FBI file," id. at 84, runs backward through time.

Not surprisingly, plaintiffs offer no evidentiary support for this chain of events. They cite again to the assumptions of Linda Tripp, see Pl. Mem. at 85, which are neither admissible, nor credible, as discussed supra, at 123-25. They cite to Mr. Livingstone's recollection of two requests for Mr. Dale's file by the Counsel's Office, see, Pl. Mem. at 84, but

he specified that both requests came after (in one case, years after) the Travel Office employees were fired, for purposes of official inquiries into that very matter. Livingstone Dep. at 513-18. As plaintiffs observe, Mari Anderson recalled that Craig Livingstone was asked for the personnel security files of the Travel Office employees about the time they were fired, see id. at 84, but even so, she also testified that when she went to retrieve their files, she found either that they had none, or that the files contained no FBI background information. Anderson Sen. Dep. at 54-55. The admissible evidence also debunks plaintiffs' speculation that it "looks as if" Mr. Dale's FBI file was removed from Mr. Foster's office and taken to Mrs. Clinton's "office in The White House Residence." Pl. Mem. at 85; see supra at 122-26.[108] Plaintiffs have no evidence that Mr. Dale's file was misused.

4. Alleged misuse of Chris Emery's FBI file.

Plaintiffs make equally unfounded allegations that the White House asked for Chris Emery's FBI background report in September 1993, and improperly requested a full-field background investigation of Mr. Emery in December 1993, in

[108] In addition, because Mr. Dale's FBI background report was not obtained by the White House until many months after Mr. Foster's death, in July 1993, it also would have required time travel to place it in Mr. Foster's office prior to his death.

search of "dirt" to justify his termination months later, in March 1994. The evidence will not support that conclusion, and so these alleged "bad acts" are not admissible to show that Messrs. Nussbaum, Livingstone and Marceca intentionally procured or misused plaintiffs' background reports. Huddleston, 485 U.S. at 689 n.6; Clarke, 24 F.3d at 263.

OPS requested Mr. Emery's previous report from the FBI in September 1993, in connection with the Update Project. See supra at 28; Swails-Brown Decl., Exh. K at 26; see also Pl. Exh. 56 at 20-21. At the time, he remained an employee of the White House.[109] Mr. Emery was by no means singled out; on that September date, OPS requested the previous reports of 86 other Residence employees. See supra at 28; Swails-Brown Decl., Exh. K at 26-29.[110]

Also in September 1993, in response to the OPS request, the FBI provided a copy of Mr. Emery's 1986 background report,

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[109] Specifically, Mr. Emery was a White House usher, who served at the pleasure of the President. See 3 U.S.C. § 105(b)(1). As a matter of law, therefore, the White House did not have to "justify" its decision to fire Mr. Emery to anyone. It thus had no reason to go to the lengths described by plaintiffs simply to find a "justification" for its actions.

[110] Because Mr. Emery's FBI previous report was first obtained by the White House in September 1993, Ms. Tripp could not have seen it in the Counsel's Office in May or June 1993. See Tripp. Dep. at 459-60; 469-71.

but did not include the report of his re-investigation in 1991. See Hughes Decl., Exh. A at 1 009363; Def. Exh. at 23 at CGE 056215. It thus appeared to OPS that Mr. Emery was long overdue for his next five-year re-investigation. See supra at 12-13, n. 5; Gemmell Decl., ¶ 11. Accordingly, on December 15, 1993, OPS submitted a request to the FBI for a full field background re-investigation of Mr. Emery. See Def. Exh. 53. When the FBI received and processed the request, it noted that Mr. Emery had undergone a re-investigation in 1991, and therefore did not require another one at that time. The FBI so notified OPS on January 7, 1994, this time attaching a copy of Mr. Emery's 1991 summary report. See Def. Exh. 54 (filed under seal). The FBI acknowledged that it may not have forwarded the 1991 report in response to OPS's September 1993 request for Mr. Emery's previous reports. See id. The evidence gives no credence to the allegation that Mr. Emery's FBI background information was misused.

In sum, the extrinsic acts that plaintiffs seek to introduce are either impermissible character evidence, irrelevant under the standards of Rule 404(b), or unsupported and thus inadmissible under the rule of Fed. R. Evid. 403. Thus, they cannot be admitted as evidence that Bernard

Nussbaum, Craig Livingstone and Anthony Marceca acted outside the scope of their employment.

E. Plaintiffs Cite No Evidence Showing That Mrs. Clinton "Masterminded" a Scheme With Messrs. Nussbaum, Livingstone and Marceca To Improperly Obtain FBI Background Information.

Plaintiffs attempt to link these alleged extrinsic acts to the acquisition of their FBI background reports, and by implication to Messrs. Nussbaum, Livingstone and Marceca, through the person of First Lady Hillary Rodham Clinton. But in several recent filings, Mrs. Clinton has thoroughly rebutted the idea that these individuals were acting at her direction, or that she had any involvement in the FBI files matter, the release of information about Mss. Tripp and Willey, or any of the remaining "bad acts" that plaintiffs allege. Thus, the linchpin of plaintiffs' entire conspiracy theory is missing. Rather than burden the Court by re-hashing these matters in unnecessary detail, the government makes the following brief observations, and incorporates by reference the more detailed arguments set forth by Mrs. Clinton.

1. Mrs. Clinton had nothing to do with the acquisition or any alleged "misuse" of plaintiffs' FBI background reports.

The First Lady has submitted a sworn declaration in this case, expressly denying each and every allegation made against her in plaintiffs' complaint. Most relevant here, she never ordered or requested Messrs. Nussbaum, Livingstone and Marceca, or anyone else, for that matter, to obtain FBI

background information on any former employees of the Reagan or Bush Administrations.[111] Incredibly, plaintiffs argue that Mrs. Clinton's declaration actually constitutes "further evidence" against her. Pl. Mem. at 68. Even assuming that this notion must be rebutted, Mrs. Clinton has already forcefully done so.[112]

As support for their theory that Mrs. Clinton "master-minded Filegate," plaintiffs continue to peddle hearsay by Sherry Rowlands, the "former companion" to Dick Morris. See Pl. Mem. at 71-72. Ms. Rowlands' account of what Mr. Morris told her, whether set forth in a declaration, or the tabloids, is still hearsay. The only competent evidence here is Mr. Morris's sworn statement that he has no personal knowledge of who was responsible for the FBI files matter, and that Ms. Rowlands' account of their conversation is inaccurate. See Mem. of law in Support of Defendant Hillary Rodham Clinton's

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[111] Declaration of Hillary Rodham Clinton dated July 11, 1999 ("Clinton Decl."), ¶ 2 (Exh. 6 to Opp. to Pl. Motion for Leave to Depose Defendant Hillary Rodham Clinton, and Mem. in Support of Cross-Motion for Protective Order (July 12, 1999) ("Clinton Opp. to Pl. Motion for Deposition").

[112] See Clinton Opp. to Pl. Motion for Deposition at 9-10; Reply to Pl. Rule 56(f) Opposition to Hillary Rodham Clinton's Motion for Summary Judgment ("Clinton Summary Judgment Reply") (July 29, 1999) at 2-3; Reply of Hillary Rodham Clinton in Support of Cross-Motion for Protective Order ("Clinton Protective Order Reply") (Aug. 30, 1999) at 5-6.

Motion for Summary Judgment (July 6, 1999) ("Clinton Summary Judgment Motion") at 9-12; Clinton Opp. to Pl. Motion for Deposition at 11-13; Clinton Protective Order Reply at 6-10.[113/] Furthermore, plaintiffs' bald assertion that Mr. Morris was an "agent of the Clinton's [sic]," whose statments can therefore be taken as admissions of the First Lady, is completely unsupported by the law or the facts. See Clinton Protective Order Reply at 6-10. It is a matter of public Record that Mr. Morris was hired as a political consultant by the Clinton-Gore presidential re-election campaign, not as a government employee, and there is no evidence whatsoever that he was an "agent" of the First Lady.

Thus lacking any direct evidence of the First Lady's involvement in this matter, plaintiffs posit that her alleged involvement in matters such as hiring decisions in the White House Counsel's Office leads to the conclusion that she must have played a role in OPS's acquisition of FBI summary reports on individuals who no longer required White House access. See Pl. Mem. at 16, 22-27. None of this follows as a matter of

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[113/] Plaintiffs do not even acknowledge Mr. Morris's sworn denials, but his testimony is highly credible. As plaintiffs themselves observe, he is no "friend" of the Clinton White House, having published numerous editorials critical of the Clinton Administration, which plaintiffs purport to rely on to support their case. See Pl. Mem. at 71 n. 32; Pl. Exhs. 6, 11.

common sense, while plaintiffs' factual contention that Mrs. Clinton "packed" the Counsel's Office with her "yes men," id. at 34, has been addressed and rebutted elsewhere. See supra at 78; Clinton Opp. to Pl. Motion for Deposition at 20-22. Most notably, Mr. Nussbaum testified that while Mrs. Clinton, among others, recommended him for his appointment as White House Counsel, it was the President who actually made the decision. Nussbaum Dep. at 187:3-188:12. The President also hired Vince Foster as Deputy White House Counsel, because he was regarded by both the President and Mrs. Clinton as a "superb lawyer . . . of the highest integrity and probity," a view that Mr. Nussbaum shared. Id. at 108:9-12; 112:10-22; 114:2-12. Mr. Nussbaum hired William Kennedy, "on the basis of [his] conversations with Foster," and after seeking out the First Lady to confirm that he was "a good lawyer . . . honest, trustworthy [and] highly intelligent." Id. at 127:3-5, 130:6-11; 132:6-21; 135:12-15.

Mr. Nussbaum stated the obvious when he explained that it was only natural to consult with Mrs. Clinton about these appointments. "These people worked together so they kn[ew] each other. They've been partners, all three of them, Kennedy, Foster and Mrs. Clinton." Id. at 133:13-16. But otherwise, Mr. Nussbaum "rarely consulted with Mrs. Clinton on

personnel matters." Id. at 134:1-2, 138:7-16. Nor did Mrs. Clinton "try to impose herself on virtually any issue" when Mr. Nussbaum was White House Counsel. Id. at 134:19-20.

2. Mrs. Clinton did not hire Craig Livingstone.

Finally, plaintiffs doggedly insist that the First Lady hired Craig Livingstone as Director of OPS, see Pl. Mem. at 27-29, relying on "evidence" which is not competent, and which has been exhaustively rebutted in Mrs. Clinton's pleadings.[114/] That Mrs. Clinton played no role in hiring Mr. Livingstone has been attested to by every witness with first-hand knowledge of the matter, including Mrs. Clinton, and Mr. Livingstone.[115/] Craig Livingstone evidently found his way into the White House the old-fashioned way, through his contacts on the Clinton-Gore 1992 Presidential Campaign, and the Inaugural Committee. See supra at 8-9; Livingstone Decl., ¶¶ [3-5] & Exh. A; Def.

[114/] See Clinton Summary Judgment Motion at 20 n.15; Clinton Opp. to Pl. Motion for Deposition at 14-20; Clinton Summary Judgment Reply at 2-4; Clinton Protective Order Reply at 18-20.

[115/] See Clinton Decl. ¶ 5; Livingstone Decl. ¶ 8; Livingstone Dep. at 300-04, 325-30, 390-97; Kennedy Dep. at 206-07, 257-59, 274; Nussbaum Dep. at 326-36; Pl. Exh. 56 at 18-19.

Exhs. 7, 8. These did not include Mrs. Clinton. See Livingstone Dep. at 271:11-273:5.[116]

At a loss for viable evidence that Mrs. Clinton actually hired Craig Livingstone, plaintiffs infer that the First Lady must have ordered his placement as Director of OPS, because he assertedly lacked the credentials to make sensitive personnel security decisions. Pl. Mem. at 35. Plaintiffs cite no evidence to support this view (except equally conclusory assertions of the House Report, at 10-11), and overlook the fact that it was the job of the Counsel's Office, not Mr. Livingstone, to make decisions about who should or should not work in the White House. Mr. Livingstone was hired to perform an important but nevertheless administrative function, managing the flow of paperwork used to gather information the Counsel's Office needed to make suitability determinations.[117]

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[116] Plaintiffs assert that Mr. Sculimbrene testified before the House Government Reform and Oversight Committee that during a March 1993 interview, Mr. Livingstone "linked his hiring to Mrs. Clinton." Pl. Mem. at 28. Plaintiffs, however, fail to cite to any such testimony. In addition, while Mr. Sculimbrene's declaration states that "[c]ontemporaneous notes from my 1993 desk calendar corroborate and reflect Livingstone's account of his relationship to Hillary Clinton," such notes are nowhere to be found among plaintiffs' 76 exhibits. See Sculimbrene Decl., ¶ 4.

[117] See supra at 9-10; Wetzl Decl., ¶ 6; Livingstone Decl., ¶ 10; Nussbaum Dep. at 40:5-17, 106:11-107:12; 125:8-

(continued...)

Plaintiffs are not content, however, to leave it at that.

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[117]/(...continued)
10; Livingstone Dep. at 328:11-329:5, 365:6-366:2; 380:11-12, 480:6-481:5; 485:20-486:19; Deposition of Christine Varney dated July 23, 1996 ("Varney House Dep.") at 13, 18, 27-28 (Pl. Exh. 31).

The facts are that William Kennedy decided to retain Mr. Livingstone as Director of OPS, without input from the First Lady, based in part on the advice of the President's Cabinet Secretary, Christine Varney, who had worked previously with Mr. Livingstone and recommended him as someone who could handle the administrative position for which he was being considered. Kennedy Dep. at 259:15-23, 273:22-274:19, 280:11-18; Varney House Dep. at 7, 9-10, 12, 14. See also Kennedy Dep. at 202:16-17,; Nussbaum Dep. at 41:5-13. Plaintiffs can second-guess and disagree with Mr. Kennedy's decision if they wish, but their unsubstantiated opinions of Mr. Livingstone's character are not evidence that he was hired by Mrs. Clinton to obtain FBI background information on political rivals of the White House.[123/]

[123/] Jane Sherburne's reference to Mr. Livingstone in a memorandum dealing with "Foster Document Handling," Pl. Exh. 32 at 5-6; see Pl. Mem. at 37-38, had to do with the (false) allegation that he removed documents from Vince Foster's office the day after Foster's suicide, not concern that he was unsuited to his job. Deposition of Jane C. Sherburne, dated June 21, 1999, at 275:15-277:18 (Def. Exh. 58). Mr. Livingstone's note to Jack Quinn, pledging to keep a "low profile," Pl. Exh. 33; see Pl. Mem. at 38 n. 18, had only to do with his complaints that he had not received pay raises that he had requested. Sen. Hrg. at 19-20 (Def. Exh. 42).
(continued...)

F. Plaintiffs' Ad Hominem Character Attacks Are Not Evidence of a "Cover Up."

Once it becomes apparent that the plaintiffs have no evidence to support their claims, they predictably raise the cry of a "cover up." But the defendants are no more responsible for a cover up than they are for the acts of political espionage that plaintiffs have sought, but failed, to prove.

Contrary to plaintiffs' accusation, the White House never withheld Billy Dale's personnel security file from the House committee. Pl. Mem. at 97. In response to the committee's subpoena, see supra at 43, et seq., the White House promptly offered to make all its files on Billy Dale available for "in camera" inspection by the committee staff, so as better to protect Mr. Dale's privacy interests. Sherburne Sen. Dep. at 97-99. Once the committee rejected that proposal, the White

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[123]/(...continued)
Senator DeConcini's August 1994 letter to the President, Pl. Exh. 34; see Pl. Mem. at 38, recommended structural reforms to the pass-issuance process, and made no personal criticisms whatsoever of Mr. Livingstone.

House immediately turned over those files, on May 30, 1996. Id. at 103-07.[124]

When Chairman Clinger announced on June 4, 1996, that these documents included Mr. Dale's background report, requested seven months after he had been fired, the Counsel's Office, with Mr. Livingstone's assistance, determined that Mr. Dale's file was actually one of over 300 files that Mr. Marceca had established on persons no longer working at the White House. Supra at 43, et seq.; Sherburne Dep. at 125:13-128:12; Livingstone Decl., ¶ 42. The White House immediately announced that fact to the world, on June 5 and 6, 1996, and transferred the files to the FBI. Def. Exh. 59. The Bureau then turned them over to OIC. Supra at 45 n. 28; Sherburne Sen. Dep. at 141-42; Def. Exh. 31 at FBI 000295. This is not the stuff of which cover-ups are made.

In truth, plaintiffs' complaints about a cover up are the cover story for an extended series of attacks on the integrity and veracity of the defendants, their colleagues, and their counsel, an attack launched in the apparent hope that the Court will decide the issues before it based on a misbegotten

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[124] Plaintiffs allegations of "foot-dragging" by the White House are based on a recitation of facts in the House Report that were disputed along party lines. Pl. Mem. at 97, citing House Report at 4; see House Report at 116.

impression of people's characters, rather than the evidence. But there are rules of evidence, ethics, candor and civility that do not recognize this as a permissible form of advocacy, especially where, as here, the allegations, to a one, are false.

As usual, plaintiffs have no support for their habitual claims of witness intimidation. Linda Tripp's hearsay account of what she allegedly "heard through various press outlets" is not evidence that Mrs. Clinton, or any of the defendants, engineered her July 1999 indictment on state charges of illegal wire-tapping. See Pl. Mem. at 110-11. "Sure enough," id. at 111, is not proof that links this recent event to Mrs. Clinton, or to Ms. Tripp's disputed conversation with Bruce Lindsey, which took place over five years ago, if it occurred at all.[125/] The salient facts here are that the state grand

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[125/] See Declaration of Bruce R. Lindsey, dated February 16, 1999, ¶¶ 6, 8 (attached as Exhibit A to EOP's Combined Memorandum In Support of Its Motion for a Protective Order Barring The Deposition of Bruce R. Lindsey, [etc.], dated February 18, 1999); see also Memorandum and Order dated April 21, 1999 (rejecting this assertion as a basis for deposing Mr. Lindsey). Ms. Tripp's testimony about the nature of this alleged conversation is called into question by the fact that, three years later, in 1997, and long after she had left the White House, she repeatedly sought out Mr. Lindsey to give him a friendly "heads up" about Ms. Willey's forthcoming allegations. In re: Grand Jury Proceedings, Testimony of Linda R. Tripp (July 14, 1998) at 110-11 (Excerpt at Def. Exh. 60); see Pl. Exh. 55 at 22; EOP's Opposition to Pl. Motion to

(continued...)

jury investigation of Ms. Tripp began in February 1998, long before she was even identified as a possible witness in this case, and her indictment was handed down in July 1999, many months after it could have had any effect on her deposition testimony in this matter. See Fern Shen, "Court Rules Tripp Prosecutor Need Not Make Grand Jury Material Public," Washington Post, Sept. 22, 1999, at A6 (Def. Exh. 61).

Likewise, plaintiffs cannot transform Dennis Sculimbrene's personnel disputes with the FBI into a case of witness intimidation. Pl. Mem. at 111-13. Mr. Sculimbrene's complaints of adverse employment actions have all been addressed and rejected in administrative proceedings before the Bureau, and have nothing to do with anything so sinister as a cover up. Department of Justice Final Decision in the matter of M. Dennis Sculimbrene v. FBI (Apr. 29, 1999) (Def. Exh. 62).[126/] Most of these alleged acts of intimidation

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[125/](...continued)
Compel Further Responses to Pl. Fifth Set of Requests for the Production of Documents, dated August 9, 1999, Exh. 2 (Mr. Lindsey's notes of his 1997 conversation with Ms. Tripp).

[126/] For example, Mr. Sculimbrene states that EOP requested the FBI to conduct a background re-investigation of him "after [he] was removed from the White House." Sculimbrene Decl., ¶ 14. But according to Mr. Sculimbrene himself, the request for his five-year re-investigation was allegedly made on May 30, 1996, see Complaint, Sculimbrene v. Reno, No. 99-0210 (D.D.C. July 26, 1999) ¶ 102 (excerpt at
(continued...)

occurred before June 1996, when the FBI files matter became public. Sculimbrene Decl., ¶¶ 10-12. There could not have been a cover up underway before this matter was even known about in the first place.

Plaintiffs also have no evidence whatsoever for the serious charge that the short-lived Inspector General investigation of the two Secret Service Special Agents who testified before Congress was "yet another effort [by the White House] to punish material witnesses in Filegate." See Pl. Mem. at 113-15. (Indeed, by the time the investigation began, the testimony of these agents had already been rendered wholly immaterial by OIC's release of the June 10, 1993 pass holder list. See supra at 45-46.) The Inspector General's investigation was initiated at the behest of Representative Cardiss Collins, not "instigated" by the White House, as plaintiffs assert. Def. Exh. 39 at 2; Pl. Exh. 72. It was closed without any adverse findings against, indeed, without any suggestion of wrongdoing by, the two Secret Service Agents. See Pl. Exhs. 73, 74.

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[126]/(...continued)
Def. Exh. 63), whereas he remained a White House pass holder until June 28, 1996. Sculimbrene Decl., ¶ 14. Mr. Sculimbrene was due for a five-year re-investigation in 1996, as his last background investigation had occurred in 1991. See Hughes Decl., Exh. A at 1 009327-33.

Plaintiffs also have no excuse for leveling thinly veiled charges of perjury. Pl. Mem. at 101. Messrs. Stephanopoulos, Ickes and McLarty had no involvement in the use or acquisition of plaintiffs' FBI background reports, or anyone else's.[127/] It is not a case of "feigned memory loss" when these gentlemen, each with his own substantial portfolio of duties and responsibilities within the White House to attend to,[128/] fail to recall details of conversations they may or may not have had, years earlier, about a matter in which they certainly had no personal involvement.

Indeed, the Court has already found that "plaintiffs have made no showing that [Mr. Stephanopoulos's] lack of recollection is disingenuous," Memorandum Opinion dated May 28, 1998, at 45-46, and refused to entertain similar claims

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[127/] In 1993, "Mack" McLarty was White House Chief of Staff. Deposition of Thomas F. McLarty, III dated August 5, 1998 ("McLarty Dep.") at 7-9 (Excerpts at Def. Exh. 64). George Stephanopoulos served as Director of the White House Office of Communications until May 1993, and thereafter as Senior Advisor to the President for Policy and Strategy. Stephanopoulos Dep. at 148, 162-63. Harold Ickes was not even employed by the White House until January 1994. Deposition of Harold Ickes dated May 21, 1998, at 29 (Excerpts at Def. Exh. 65). None of these gentlemen had any reason to know what business OPS was conducting in the fall of 1993.

[128/] See McLarty Dep. at 8-13; Stephanopoulos Dep. at 149-50; Declaration of Harold Ickes (Sept. 18, 1998) ¶ 8 (Exh. B to Opp. of Non-Party Harold Ickes to Pl. Motion To Compel Further Testimony (Sept. 18, 1998).

against Mr. Ickes absent "stronger evidence," Memorandum and Order dated December 23, 1998, at 17, which has not been forthcoming.[129] In their pending motion to compel further testimony from Mr. McLarty, plaintiffs do not move to compel on the basis of the alleged loss of memory at all. See Pl. Motion to Compel Further Deposition Testimony and Production of Documents from Thomas F. McLarty III (July 16, 1999).[130]

Plaintiffs' charge that Mr. Livingstone's counsel may have suborned perjury, in the act of assisting Mr. Marceca in the preparation of his June 9, 1996 declaration, Def. Exh. 22, is just as indefensible. Pl. Mem. at 98. The declaration is,

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[129] The hearsay accounts in several recently published books, to which plaintiffs cite, Pl. Mem. at 103-05, are not in conflict with witnesses' testimony.

[130] In a related vein, plaintiffs contend that non-party witnesses Terry Lenzner and Larry Potts, both of whom work for Investigative Group International ("IGI"), "refused to answer critical questions at depositions." See Pl. Mem. at 96. But neither Mr. Lenzner nor Mr. Potts could possibly have anything "critical" to contribute to this case, because neither played any role in, or has any direct knowledge of, the FBI files matter. See, e.g., Deposition of Larry Potts, dated August 18, 1998, at 35-36 (Excerpts at Def. Exh. 66); Deposition of Terry F. Lenzner dated March 13, 1998, at 36-38, 59, 66-67, 81 (Excerpts at Def. Exh. 67). The questions for which Lenzner and Potts have claimed privilege, on instruction of IGI's clients, are devoid of relevance to the issues before the Court. See Response of Non-Party Larry Potts in Opposition to Pl. Motion to Compel Further Testimony [etc.] (June 25, 1999); Mem. of Law in Support of President Clinton's Partial Opp. to Pl. Motion to Compel Further Testimony of Larry Potts (June 25, 1999); Notice of Filing (re: Terry Lenzner) (June 14, 1999).

in fact, wholly consistent with Mari Anderson's subsequent testimony and the entire record of competent evidence in this case. Aside from the fact that the declaration is at odds with plaintiffs' own, completely unsupported theory of the case, they do not identify a single statement in the declaration that is false, much less that Mr. Livingstone's counsel knew or had any reason to know that any statement was false when it was drafted.

There is likewise no justification for the charge that former FBI General Counsel Howard Shapiro was engaged in a cover up when he notified the White House (together with the House committee) of the undated, unsigned memorandum in Craig Livingstone's background file stating that he had been highly recommended by Mrs. Clinton. Pl. Mem. at 95-96, citing House Report at 16-17. The conclusion of the House Report that Mr. Shapiro's actions were "grossly inappropriate," id. at 96, quoting House Report at 18, divided the committee along party lines. House Report at 120-21. The Justice Department's Office of Professional Responsibility found that Mr. Shapiro may have exercised "very poor judgment," but that he "did not engage in professional misconduct," and that his actions "were

not motivated by any alleged personal or political ambitions."[131]

Plaintiffs also have no basis for asserting that witnesses such as Anthony Marceca and Clifford Bernath have been bribed. Pl. Mem. at 76, 94. There is nothing "unusual" in the fact that Mr. Marceca, a civilian employee of the U.S. Army, has received the same routine "step" increases in pay that all civil servants are entitled to for their time in service. Marceca Dep. at 376-77. The testimony is undisputed that Mr. Bernath received a $10,000 award, and was offered his position with the Armed Forces Information Service, because he earned them, and not as "payoff[s]" for his "continued loyalty" in the Tripp matter. Bacon Dep. at 385-87; Bernath Deposition at 434-35; see also id. at 426:9-15, 448:14-18, 430:3-8.

In short, plaintiffs have leveled charges of criminal wrongdoing, in many cases against persons having so little if anything to do with the events at issue, and with such complete disregard for the facts, that this slew of accusations can only be understood as a calculated diversion

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[131] Department of Justice, Summary of Investigation by the Office of Professional Responsibility into the Conduct of FBI General Counsel Howard M. Shapiro, dated March 28, 1997, at 29; see id. at 9-24 (Def. Exh. 68.)

from the essential fact of the matter: Messrs. Nussbaum, Livingstone and Marceca all acted within the scope of their employment at all times relevant to plaintiffs' tort claims. Because plaintiffs have no competent evidence to the contrary, their challenge to the Attorney General's scope-of-employment determination must be rejected.

III. PLAINTIFFS' TORT CLAIMS AGAINST THE UNITED STATES MUST BE DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

A. Exhaustion of Administrative Remedies Is a Jurisdictional Pre-Requisite to Plaintiffs' Tort Claim Against the United States.

Because Messrs. Nussbaum, Livingstone and Marceca acted within the scope of their employment, plaintiffs' tort claims against these individuals must proceed as "an action against the United States," under the Federal Tort Claims Act ("FTCA"), with the government "substituted as the party defendant." 28 U.S.C. § 2679(d)(1); Kimbro, 30 F.3d at 1504.

In waiving the United States' immunity from suits for money damages under the FTCA, Congress established as an absolute jurisdictional pre-requisite that the allegedly injured party present an administrative claim to the responsible federal agency prior to filing suit in federal court. 28 U.S.C. § 2675(a); see McNeil v. United States, 508 U.S. 106, 110-13 (1993). The claimant may not seek recovery

in federal court until the administrative claim is denied, or six months have elapsed without a decision from the agency. 28 U.S.C. § 2675(a). In the present case, plaintiffs have yet to present an administrative claim as required by section 2675(a) of the FTCA. Consequently, their invasion of privacy claim against the United States must be dismissed pending exhaustion of their administrative remedies.

B. The Attorney General's Scope-of-Employment Determination Cannot Be Rejected as a "Sham."

Plaintiffs attempt to sidestep this absolute jurisdictional hurdle in two ways. First, they contend "Ms. [Helene] Goldberg's [deposition testimony in response to plaintiffs' Rule 30(b)(6) subpoena to the Department of Justice] was so lacking that it constitutes an admission that there was simply no basis for certification on behalf of Nussbaum, Livingstone or Marceca." Pl. Mem. at 9.

To the contrary, as the deposition of Ms. Goldberg and the attached exhibits make clear, the certification followed interviews with many witnesses and the review of a substantial number of documents.[132/] Under Rule 30(b)(6), and the Court's Memorandum and Order dated June 22, 1999, at 6, it is simply

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[132/] See, e.g., Deposition of Helene Goldberg dated June 29 and July 7, 1999 ("Goldberg Dep."), at 40 & Exh. 4 (listing witnesses interviewed and documents reviewed in the scope of employment inquiry) (Def. Exh. 69).

immaterial that Ms. Goldberg, as the Justice Department's designated witness, did not personally conduct these interviews, or review the documents.

In any case, the Court has already stated that the "remedy for any shortcoming" in the certification process is "the presentation of the relevant facts . . . directly to the court under a de novo standard, not through indirectly attacking the inadequate process of or basis for the certification." Order of June 22, 1999 at 6; see also Operation Rescue Nat'l v. United States, 975 F. Supp. 92, 102 (D. Mass. 1997), aff'd, 147 F.3d 68 (1st Cir. 1998), cert. denied, 119 S. Ct. 866 (1999). Thus, plaintiffs' attack on the certification as a "sham" is legally and factually misplaced.[133/]

C. The Seventh Amendment Does Not Bar Resolution of

[133/] Plaintiffs' related argument, that the individual defendants should be denied the immunity from suit that Congress intended for them as a sanction for the Justice Department's alleged "failure to respond ... in a proper manner" to the Rule 30(b)(6) subpoena, is meritless. Pl. Mem. at 9. The Court ordered that plaintiffs were entitled to learn "the identities of witnesses with knowledge of relevant facts," and "documents contemporaneous with the actions taken by the individual defendants that serve as the basis of the scope-of-employment determination." Memorandum and Order of June 22, 1999, at 15. The Justice Department properly provided such underlying information at the deposition. See, e.g., Goldberg Dep. at 40 & Exh. 4. Plaintiffs contested the government's position during the deposition, but never filed a motion to compel further testimony afterward.

the Scope-of-Employment Issue at This Juncture.

Plaintiffs next contend that the Seventh Amendment requires this Court to postpone the scope-of-employment determination until they have had the chance to present their case against Mrs. Clinton to a jury. Pl. Mem. at 125-26.[134] This is incorrect. For one thing, plaintiffs' argument is premature. There is no Seventh Amendment right to a jury trial if there are no facts for the jury to find. See, e.g., Whitsell v. Alexander, 229 F.2d 47, 48-49 (7th Cir. 1956) (citing Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1903)) ("summary judgment [does not] infringe[] the right to a jury trial preserved by the Seventh Amendment to the Constitution where the question is one of law"), cert. denied, 351 U.S. 932 (1956). Unless and until the plaintiffs, by competent evidence, "can set forth specific facts showing that there is a genuine issue for trial" against Mrs. Clinton, Fed. R. Civ. P. 56(e), the Seventh Amendment issue will never even arise in this case.[135]

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[134] Plaintiffs appear to argue, however, that this claimed Seventh Amendment right somehow does not require postponing the scope-of-employment determination if it were to be made in their favor. Pl. Mem. at 126.

[135] In addition, both the Court and the parties have long understood that the scope determination would precede resolution of the merits of this case. See, e.g., Order of

(continued...)

Even assuming arguendo that the claims against Mrs. Clinton could not be decided by summary judgment, that the Seventh Amendment required the claims against Mrs. Clinton to be resolved by jury trial, that this Court will make factual findings in its scope determination that relate to the claims against Mrs. Clinton before a jury hears her claims, and that those factual findings would enjoy preclusive effect, the Seventh Amendment would still not be violated by deciding the scope issue now. As this Court has recognized, Congress, through the Westfall Act, has made clear that questions of defendants' immunity should be resolved in advance of trial on the merits. April 21 Order at 3.[136] Yet plaintiffs seek to delay expedited resolution of the immunity question until

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[135](...continued)
August 12, 1997 (establishing period of discovery and briefing on substitution issue, to be followed by possible further discovery and a schedule for summary judgment motions); Order of April 21, 1999 at 3 (restating this plan). If plaintiffs believed that the Seventh Amendment requires a drastic re-ordering of the procedures by which this Court plans to decide this case -- such as postponing the scope determination until after any jury trial on the claims against Mrs. Clinton -- it should have been brought to this Court's attention (and defendants') long ago.

[136] See, e.g., Schrob, 967 F.2d at 935, 936; see also Kimbro, 30 F.3d at 1509; Maron v. United States, 126 F.3d 317, 327 (4th Cir. 1997); Gutierrez de Martinez, 111 F.3d at 1153-55; Melo, 12 F.3d at 742; Brown v. Armstrong, 949 F.2d 1007, 1012 (8th Cir. 1991); Wilson v. Jones, 902 F. Supp. 673, 679 (E.D. Va. 1995).

after a jury trial of their claims against Mrs. Clinton -- indeed, they wish to postpone the immunity question until "trial on the merits [against] Nussbaum, Livingstone and Marceca." Pl. Mem. at 126 (emphasis added).

Allowing a party to forestall the statutorily prescribed speedy resolution of immunity issues simply by bringing jury-trial claims against a defendant for whom substitution is not sought would permit a plaintiff to entirely undermine Congress' carefully wrought scheme. Where Congress enacts "a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury," the Seventh Amendment does not require courts to postpone resolution of that claim until after a jury trial. Katchen v. Landy, 382 U.S. 323, 339 (1966).[137] Indeed, rejecting another

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[137] See also In re Hooker Investments, 937 F.2d 833, 839-40 (2d Cir. 1991) (approving effective denial of jury trial in order to avoid undermining statutory scheme); Agudas Chasidei Chabad of United States v. Gourary, 833 F.2d 431, 438 (2d Cir. 1987) (noting that "under certain circumstances an equitable claim may sometimes be tried first even though such trial decides the legal issues also pleaded"); Mission Bay Campland, Inc. v. Sumner Financial Corp., 72 F.R.D. 464, 468-69 (M.D. Fla. 1976) (denying jury trial, where legislative intent of state statute was to provide "swift and summary equitable relief ... without interposing a jury trial"); In re Holiday Inns of America, 42 F.R.D. 27, 32 (N.D.N.Y. 1967) (trying bench issues before holding jury trial, where judicial efficiency dictated holding bench trial first since it might obviate need for subsequent jury trial); cf. Curtis v. Loether, 415 U.S. 189, 195 (1974) (Seventh Amendment concerns (continued...)

Seventh Amendment claim in a Westfall Act case, the D.C. Circuit has already made clear that "skillful pleading" cannot be used to "allow[] a plaintiff to nullify a government employee's immunity claim" by making him "go through a complete jury trial on the merits only after which would it be known that he was actually always immune from that which he had endured." Kimbro, 30 F.3d at 1509.

Alternatively, even if it would violate the Seventh Amendment to grant preclusive effect to factual findings the Court makes in connection with its own scope-of-employment determination, it still does not follow that the Court must postpone adjudicating the scope-of-employment question. An essential pre-condition to the application of collateral estoppel is that "preclusion . . . must not work an unfairness."[138/] It goes without saying that wrongfully denying a party her constitutional rights would be unfair. Accordingly, if the effect of preclusion would be to unfairly

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[137/](...continued)
applicable "where there is obviously no functional justification for denying the jury trial right").

[138/] Kronheim & Co., Inc. v. District of Columbia, 91 F.3d 193, 197 (D.C. Cir. 1996), cert. denied, 520 U.S. 1186 (1997); Nasem v. Brown, 595 F.2d 801, 806 (D.C. Cir. 1979) (collateral estoppel should not be applied when "the possible gains of fairness or accuracy from continued litigation" outweigh judicial efficiency).

deny the plaintiffs their Seventh Amendment right to a trial by jury, then the doctrine of collateral estoppel, by its own terms, simply would not apply.[139]

CONCLUSION

For the foregoing reasons, plaintiffs' challenge to the Attorney General's scope-of-employment certification should be rejected. Their tort claim against the United States should also be dismissed, for failure to exhaust administrative remedies.

Dated: October 1, 1999

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[139] Cf. Lytle v. Household Manufacturing, Inc., 494 U.S. 545, 553-54 (1990) ("judicial economy . . . remains an insufficient basis for [disregarding] a litigant's right to a jury trial" when relitigation is "essential to vindicating [a party's] Seventh Amendment Rights").

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